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IN THE

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OF

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JUDGES
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SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS

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FREDERICK WILMER SIMS
ROBERT RIDDICK PRENTIS
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JOHN GARLAND POLLARD

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CASES DECIDED
IN THE
Supreme Court of Appeals
OF VIRGINIA.

Mytherville.

BARROW AND OTHERS V. COUNTY OF PRINCE EDWARD.

June 14, 1917.

Absent, Burks, J.*

1. **TAXATION—*Recovery of Taxes Voluntarily Paid.***—At common law, taxes illegally assessed but voluntarily paid cannot be recovered.
2. **PAYMENT—*Voluntary Payment.***—Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, as to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary.
3. **TAXATION—*Voluntary Payment of Taxes Illegally Assessed—Remedy—Bill in Equity Does Not Lie.***—The Virginia Statute, sections 567 to 571, of the Code of 1904, provides a simple, expeditious, and inexpensive remedy at law by motion, whereby taxes erroneously assessed and collected may be recovered within two years from the first day of September of the year in which the assessment is made, even though voluntarily paid. Therefore, a bill in equity does not lie in such a case.

Appeal from a decree of the Circuit Court of Prince Edward county. Decree for defendants. Complainants appeal.

Affirmed.

*Case submitted before Judge Burks took his seat.

Opinion.

The opinion states the case.

E. Warren Wall, for the appellants.

A. D. Watkins, C. V. Meredith and *Samuel A. Anderson*,
for the appellees.

PRENTIS, J., delivered the opinion of the court.

The appellants being taxpayers in the town of Farmville, in Prince Edward county, on behalf of themselves and all other persons similarly situated, filed their bill in equity against the county of Prince Edward, its treasurer and board of supervisors, the object of which was to compel the repayment by such treasurer of road and poor taxes for the year 1913, and of the road tax for the year 1914, theretofore collected from taxpayers of the town of Farmville.

That a similar county road tax was illegally assessed for 1915 and could not be collected, has been this day decided by this court in the case of *Watkins v. Barrow*, 121 Va. post, 92 S. E. 908.

The question at issue in this cause is whether such taxes for 1913 and 1914, which have already been paid, can be recovered in this proceeding. This question must be answered in the negative for two reasons.

1. The taxes in question were voluntarily paid, and it is well settled at common law that such payments cannot be recovered.

In the case of *Lamborn v. Dickenson County*, 97 U. S. 181, 24 L. Ed. 926, the Supreme Court of the United States approves the following statement of the common law doctrine: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property,

such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary." *Phillips v. Jefferson Co.*, 5 Kansas 412.

This statement of the law is reiterated in *Union Pacific &c. R. Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 197, and is approved in this State in the cases of *Mayor of Richmond v. Judah*, 5 Leigh (32 Va.) 305, and *Town of Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667.

2. Each of the aggrieved taxpayers of the town of Farmville, however, had his remedy at law by motion under section 571 of the Code.

The Virginia statute, sections 567 to 571 (inclusive) of the Code, provides a simple, expeditious and inexpensive remedy at law by motion, whereby taxes erroneously assessed and collected may be recovered within two years from the first day of September of the year in which the assessment is made, even though voluntarily paid. *Hotel Richmond v. Commonwealth*, 118 Va. 607, 88 S. E. 173.

For these reasons, we are of opinion that the decree sustaining the demurrer to the bill is without error, and, therefore, it will be affirmed.

Affirmed.

Mythville.

EASTERN COAL AND EXPORT CORPORATION V. BEAZLEY & BLANFORD.

June 14, 1917.

Absent, Burks, J.

1. INSTRUCTIONS—*Not Based on the Evidence.*—It is well settled that it is error to give an instruction when there is no evidence to support it.
2. INSTRUCTIONS—*Read as a Whole—Erroneous Instruction Cured by Another.*—Although an instruction, standing alone, may have been misleading, the verdict of the jury will not on that account be set aside, when it appears that the objection thereto was corrected by other instructions given by the court. In other words, instructions in a given case are to be read as a whole, and when so read, if it can be seen that the instructions could not have misled the jury, their verdict will not be disturbed, even though one or more of the instructions were defective. Defects in one instruction may be cured by a correct statement of the law in another.
3. INSTRUCTIONS—*Refusal to Give Instruction Covered by Other Instructions.*—The omission from one instruction of a correct statement of the law applicable to the facts of the case is harmless, where the same principle was embodied, in plain and unmistakable language, in other instructions given.
4. DAMAGES—*Avoidable Consequences.*—The doctrine of avoidable consequences applies to consequential damages and not to direct damages flowing from a breach of contract.
5. SALES—*Damages—Avoidable Consequences.*—Defendant entered into a contract with plaintiffs to deliver coal to plaintiffs at an agreed price. Subsequently, defendant informed plaintiffs that it was unable to fulfill its contract, but that it had turned plaintiffs' order over to another corporation, which had assumed all responsibility as sellers and suppliers of the coal, and requested plaintiffs to address a letter to that corporation confirming defendant's action. Plaintiffs declined to accede to that proposal, but expressed their willingness for the defendant to fill their order with coal obtained from that corporation. Plaintiffs had never heard of the other corporation and were un-

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willing to accept it as a substitute for the defendant. Besides, there were several material differences between the terms of the original contract and the one they were asked to accept by way of substitution.

Held: That defendant could not thus relieve itself of liability under its contract. It would, indeed, be a strange perversion of the doctrine of avoidable consequences if under it a defendant, who without sufficient cause had breached his contract, could compel a plaintiff, who was in no default, to enter into a contract for the delinquent's protection, the hazard of which he was unwilling to incur.

Error to a judgment of the Law and Equity Court of the city of Richmond, in a motion for damages. Judgment for plaintiffs. Defendant assigns error.

Affirmed.

The instructions given by the trial court were as follows:

1. The court instructs the jury that the order of the plaintiffs, dated October 27, 1915, delivered to the defendant's agent, was a mere proposal to buy the coal therein described, and was not binding upon either party, until it was accepted by the defendant, and the plaintiffs notified of such acceptance, and the conditions printed on the back of said offer as well as on the formal acceptance dated October 29, 1915, constituted a part of the contract. The contract between the parties in this case was in writing and consisted of the order slip, the letter of October 29th accepting the order and the form of acknowledgment enclosed therewith, and none of the oral testimony must be taken as altering or adding to the terms of the contract so made.

If the jury believe from the evidence that the defendant failed or refused to deliver the coal as stipulated in the contract, and that the plaintiffs were damaged thereby, then the plaintiffs are entitled to recover.

2. The court instructs the jury that if they believe from the evidence that the defendants were coal brokers and not producers and that this was known to the plaintiffs, and

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that after the making of the contract between the parties, the contract became impossible of performance because, for causes beyond the control of the defendants, they were unable to procure the coal and the contract was so made impossible of performance by them; then the failure to deliver the coal would not entitle the plaintiffs to damages; the burden of proof being upon the defendants to show such impossibility of performance.

3. The court instructs the jury that it was the duty of the defendant to deliver the coal in accordance with its contract with the plaintiffs, that its inability to purchase the coal from the Smokeless Fuel Company could not *relieve* it of its duty to deliver said coal to said plaintiffs unless the contract by reason thereof and upon all the evidence was rendered impossible of performance for causes beyond the control of the defendants as explained in another instruction; and its failure to deliver said coal in accordance with its contract, unless relieved of performance as stated, without fault on part of said defendants, rendered it liable to the said plaintiffs for all such damages as were the natural and proximate result of its failure to deliver the said coal in accordance with the terms of said contract.

4. The court instructs the jury that if they find from the evidence that the plaintiffs are entitled to recover, they shall assess their damages as follows:

The plaintiffs will be entitled to go into the open market and purchase the coal in the quantities and at the times stipulated for in the contract between the parties at the prevailing market price in the city of Portsmouth and its vicinity, considering the character of the plaintiffs' business and their methods and places of purchase of coal of the character contracted for, and they will be entitled to recover the difference between the contract price and the prices which they would have so to pay in purchasing the coal elsewhere.

If it was impossible for the plaintiffs to purchase said coal at the times and in the quantities mentioned in the con-

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tract, in any other way than at retail rates in the city of Portsmouth, then the said retail rate should be considered by the jury in arriving at the market price of the coal; but, if the jury believe from the evidence that there was a breach of the contract by the defendants and that upon its breach or a time thereafter reasonably sufficient to allow for purchase and delivery within the time or times contemplated by the contract between the parties, the plaintiffs could have purchased elsewhere in the wholesale market the coal as stipulated in the contract between the parties, that this was known to the plaintiffs and that they could reasonably have provided themselves with such coal by so purchasing elsewhere on the wholesale market, then the price at which they could have so purchased the coal from other brokers than the defendants or from miners should be taken as the market price, the difference between which and the contract price is the measure of damages.

S. S. P. Patteson, for the plaintiffs in error.

R. L. Montague, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

Beazley & Blanford, partners doing business in Portsmouth, Virginia, brought this motion against the Eastern Coal Export Corporation, coal broker, of Richmond, Virginia, to recover damages laid at \$500, for breach of contract to deliver coal. We are asked to review a judgment for \$400, rendered against the defendant upon the verdict of a jury.

The contract consisted of an order of the plaintiffs, dated October 27, 1915, delivered to the salesman of the defendant and accepted by the principal, for 500 tons of coal—5 hop-car loads of "Va. Anth. stove at \$3.50 per ton;" and a like

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quantity of "Va. Anth. Nut at \$3.25 per ton." "Ship so as to complete order this month." "All orders taken subject to Conditions of Sale on reverse side."

The only conditions of sale pertinent to this inquiry are:

"1. The price named in this order is binding, and not subject to market fluctuation, unless specially stipulated in writing. * * *

"3. Payment is due 10th of each month for shipments made preceding month, subject to sight draft thereafter.

"4. All sales contingent upon strikes, insufficient car supply or other causes beyond our control. * * *

The plaintiff in error assigns as error, the refusal of the court to give instructions 1, 2 and 3, requested by it, and the giving of instructions 1, 2, 3 and 4. The rejected instructions are as follows:

"1. The court instructs the jury that the order of the plaintiffs, dated October 27, 1915, delivered to the defendant's agent, was a mere proposal to buy the coal therein described, and was not binding upon either party, until it was accepted by the defendant, and the plaintiffs notified of such acceptance, and the conditions printed on the back of said offer as well as on the formal acceptance dated October 29, 1915, constituted a part of the contract. And if they believe from the evidence that it was beyond the power and control of the defendant to deliver Virginia Anthracite coal sold by the Smokeless Fuel Company, and that the defendant offered to deliver through the Fort Branch Coal Corporation of Richmond, Virginia, anthracite coal of the same grade at the same price and on the same terms, and the plaintiffs arbitrarily refused to receive it, then they are instructed that such refusal released the defendant from all further obligation to deliver the same, and they must find for the defendant.

"2. The court further instructs the jury that the measure of damages is the estimated loss directly resulting from the sellers' breach of contract, and is to be ascertained by the difference between the contract price and the market

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price of the coal at the agreed time and place of delivery. And if they shall believe from the evidence that there was no difference in the market price, and that the plaintiffs refused to purchase the coal tendered them by the defendant as set forth in instruction No. 1, then they are instructed that the defendant was excused, under the terms of its contract from any further or other performance, and is not liable in damages to the plaintiffs.

"3. The court further instructs the jury that if they believe from the evidence that the Eastern Coal and Export Corporation used every effort in good faith to get the coal from the Smokeless Fuel Company, although it had only contracted to sell Virginia Anthracite Coal of the same quality which was sold by other dealers and not that sold only by the Smokeless Fuel Company, and that it was beyond its power and control to deliver the Smokeless Fuel Company's coal, they must find for the defendant."

The court did not err in refusing to give the foregoing instructions.

1. Instructions No. 1 and No. 2 are in part covered by the court's instructions, and there is no evidence to sustain the statement "that the defendant offered to deliver through the Fort Branch Corporation of Richmond, Virginia, anthracite coal of the same grade at the same price and on the same terms, and that the plaintiffs arbitrarily refused to receive it." It is well settled that it is error to give an instruction when there is no evidence to support it. That obviously correct rule has been repeatedly declared by this court (see *Norfolk & Western Ry. Co. v. Parrish*, 119 Va. 670, 89 S. E. 923); and "Although an instruction, standing alone, may have been misleading, the verdict of the jury will not on that account be set aside, when it appears that the objection thereto was corrected by other instructions given by the court." In other words, instructions in a given case are to be read as a whole, and when so read, if it can be seen that the instructions could not have misled the jury, their verdict will not be disturbed, even though one or more of

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the instructions were defective; and defects in one instruction may be cured by a correct statement of the law in another." *Chesapeake & Ohio Ry. Co. v. McCarthy*, 114 Va. 181, 188, 76 S. E. 319, 322.

For the principle that instructions must be read and construed as a whole, see cases cited in 16 Enc. Dig. Va. & W. Va. Rep. 710, 711.

"The omission from one instruction of a correct statement of the law applicable to the facts of the case is harmless, where the same principle was embodied, in plain and unmistakable language, in other instructions given." *Wheaton v. Doughty*, 116 Va. 566, 567, 82 S. E. 94.

The effect of the transaction with the Fort Branch Coal Corporation, upon which the defense relied on in this case is substantially bottomed, seems to be wholly misapprehended. In outline, it was this: On November 3d, the defendant informed the plaintiffs by letter that it had been unable to get the Smokeless Fuel Company to fill plaintiffs' order, and, therefore, the defendant would have to cancel its contract. To that communication the plaintiffs promptly replied that they expected the defendant to "live up to the contract and deliver the coal according to its stipulations." On November 17th, the defendant wrote that it had turned plaintiffs' order over to the Fort Branch Coal Corporation of Richmond, Virginia, which had assumed all responsibility as sellers and suppliers of the coal, and requested plaintiffs to address a letter to that corporation confirming defendant's action. Plaintiffs declined to accede to that proposal, but expressed their willingness for the defendant to fill their order with coal obtained from that corporation. Plaintiffs had never heard of the Fort Branch Coal Corporation and were unwilling to accept it as a substitute for the defendant. Besides, there were several material differences between the terms of the original contract and the one they were asked to accept by way of substitution. The fact that the plaintiffs had expressed their willingness to accept coal purchased by the defendant from the Fort Branch Coal Cor-

poration refutes the pretension of the defendant that it was beyond its power and control to fulfill its engagement. The record furnishes no explanation of the effort on the part of the defendant to escape personal liability on its contract by shifting the burden of it to another corporation, between which and the plaintiffs there were no contractual relations. Nor does it appear upon what theory the defendant assumes the right to invoke the doctrine of avoidable consequences against the plaintiffs in the circumstances narrated. It would, indeed, be a strange perversion of that doctrine if under it a defendant, who without sufficient cause had breached his contract, could compel a plaintiff, who was in no default, to enter into a contract for the delinquent's protection, the hazard of which he was unwilling to incur.

In the present cases damages are claimed for injury arising from a direct breach of the contract, namely, the loss of the value of the contract itself, and in such case the doctrine of avoidable consequences does not apply. The "rule has to do with consequential loss only." 1 Sedgwick on Damages (9th ed.) sec. 208-a.

The principle is summarized in Sutherland on Damages as follows: "The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases to do or amend the work of the other party or to finish it; but only when in view of all the circumstances of the particular case it is a reasonable duty which he ought to perform instead of passively allowing a greater damage. * * * Where the party whose duty it is primarily to do the work necessary to fulfill the contract * * * has equal knowledge and opportunity, he alone may be looked to to fulfill that duty, and it will not avail him to say that the injured party might have lessened the damage by performing the duty for him." 1 Sutherland on Damages (4th ed.), sec. 88.

The doctrine announced by these eminent text-writers accords with the decision of this court in *Stonega Coal Company v. Addington*, 112 Va. 807, 73 S. E. 257, 37 L. R. A. (N. S.) 969. Keith, P., held in that case, that "When a

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party is entitled to the benefit of a contract and can save himself from loss arising from a breach of it at a trifling expense, or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could not prevent." In that case it was shown that consequential damages from the breach of the contract could have been obviated by the purchase of a pipe wrench at a cost of \$1.50 or \$1.75 and repair work on the cylinder of a pump, which any mechanic could have done in a couple of hours. Judge Keith illustrates the principle by decisions of other courts. Thus, it was held in a Massachusetts case, where it appeared that the plaintiff could have avoided injury to his crops from trespassing cattle by repairing a breach in his fence made by the defendant, it was his duty to repair. So, where one throws a stone and breaks a window, and the owner, after notice, suffers the window to remain without repairing a great length of time, he cannot recover damages when the rain beats in and injures valuable pictures and other articles. The principal case and the illustrations show that the doctrine applies to consequential damages and not to direct damages flowing from the breach of the contract.

The instructions given by the court (which will be reported with the case), we think, fully and fairly submitted the law of the case to the jury, and the evidence was quite sufficient to sustain their verdict.

We are of opinion that the court did not err in overruling the motion for a new trial, and the judgment must be affirmed.

Affirmed.

Syllabus.

Mytheneville.**THE FERRIES COMPANY V. BROWN.**

June 14, 1917.

Absent, Burks, J.*

1. **WITNESSES—Redirect Examination—Irrelevant Evidence.**—Counsel for defendant, in cross-examining the plaintiff, brought out the fact that plaintiff had been discharged from the employment of defendant on the ground that he had been stealing tickets from defendant. On redirect examination plaintiff was allowed to state that he had not been guilty. The issue involved was irrelevant, but it was injected into the case by the defendant, and there was nothing in connection with the manner in which it was subsequently dealt with upon which the defendant can base any just ground of exception.
2. **RELEASE—Personal Injuries.**—Plaintiff, a servant of defendant's, had executed an instrument releasing defendant from liability for injuries sustained by plaintiff while in the employment of defendant. In an action by plaintiff against defendant for personal injuries, defendant requested the following instruction: "The jury are instructed that if they believe from the evidence that the plaintiff executed the release exhibited, they must find for the defendant." There was no error in refusing this instruction. The plaintiff was attacking the release referred to upon the ground that it was without consideration, and that it had been procured by fraud. There was evidence tending to support this attack in both aspects, and the instruction ignored both and directed a verdict for the defendant.
3. **RELEASE—Consideration.**—A release not under seal requires the support of a valuable consideration.
4. **RELEASE—Instructions—Burden of Proof.**—The court instructed the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant.

*Case submitted before Judge Burks took his seat.

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Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request.

5. MASTER AND SERVANT—*Injuries—Question for the Jury.*—In an action by a servant against his master for personal injuries due to a wheel which he was operating “getting away” from him and striking his body, the evidence tended to show that one of the cogs of the wheel was broken out and other cogs nicked and damaged; and this condition caused the wheel to slip and break away from the control of the plaintiff.

Held: That the question as to the cause of the accident and the manner of its occurrence having been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence.

Error to a judgment of the Circuit Court of the city of Portsmouth, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

R. R. Hicks, for the plaintiff in error.

Jas. G. Martin, and *Daniel Coleman*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is an action by A. B. Brown against the Ferries Company, a corporation, to recover damages for personal injuries. There was a verdict in his favor, upon which the court entered the judgment under review.

Brown was an employee of the Ferries Company upon one of its ferry boats. It was a part of his duty to turn by hand a heavy wheel used in raising and lowering the dock so as to adjust the same for a convenient connection with

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the boat. This wheel is turned by means of hand-holds projecting several inches from its outside rim and attached thereto at the outer end of each spoke. The power from the wheel is transmitted and utilized by means of cogs at the centre so arranged as to take hold of and operate the balance of the lifting and lowering machinery as the wheel revolves. When the dock is to be raised the operator places his foot upon one of the handles, reaching over in front of him and grasping another with his hand, pulling the wheel towards him, shifting his foot and hands to the other handles as the wheel turns. While Brown was engaged in this operation, the wheel "got away" from him, striking his body and inflicting the injuries for which he brings this suit. Some of the cogs upon which the machinery turned had been broken and nicked, and it is charged in the declaration that this condition rendered the wheel unsafe for use and caused the accident.

The first assignment of error which we shall notice is, that "the court erred in permitting the plaintiff to state that he had been discharged for stealing, and to state further that he had not stolen." We think this assignment is without merit. Counsel for defendant, in cross-examining the plaintiff, brought out the fact that he had been discharged from the employment of the company, and then asked, "What for?" to which the plaintiff replied, "They said I was accused of stealing tickets." It was manifestly right and proper thereafter to permit the plaintiff to state, on redirect examination, that he had not been guilty of the theft imputed to him as a ground for his discharge. Furthermore, at a subsequent stage of the trial the defendant was permitted to introduce evidence tending to show that the plaintiff had been taking tickets. It is difficult to see how the court could have dealt with the matter with more fairness to the defendant. The issue involved was irrelevant, but it was injected into the case by the defendant, and

there is nothing in connection with the manner in which it was subsequently dealt with upon which the defendant can base any just ground of exception.

It is claimed that the court erred in refusing to give the following instruction asked for by the defendant:

"The jury are instructed that if they believe from the evidence that the plaintiff executed the release exhibited, they must find for the defendant."

The plaintiff was attacking the release referred to upon the ground that it was without consideration, and that it had been procured by fraud. There was evidence tending to support this attack in both aspects, and the instruction ignored both and directed a verdict for the defendant.

The release was as follows:

"To All to Whom These Presents Shall Come or May Concern:

"Greeting: Know ye, that I, A. B. Brown, of 702 Elizabeth street, Berkley, Va., for and in consideration of the payment by The Ferries Company to Dr. F. Lawford, of his bill for professional services rendered me in an injury received by me on June 13, 1914, while on the Steamer 'Rockaway,' the receipt whereof is hereby acknowledged, have remised, released and forever discharged, and by these presents do for me and my heirs, executors and administrators, remise, release and forever discharge the said heirs, executors and administrators of and from all and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said The Ferries Company I ever had, now have or which I or my heirs, executors or administrators, hereafter can, shall or may have for, upon

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or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

"In witness whereof, I have hereunto set my hand and seal the 6th day of July, in the year one thousand nine hundred and fourteen. Sealed and delivered in presence of

"A. B. BROWN."

This release was not under seal and required the support of a valuable consideration (34 Cyc. 1045, 1048, and cases cited in note 30). The questions of fraud and consideration were submitted to the jury by the instructions asked for both by the defendant and by the plaintiff, and these issues were found for the plaintiff. The instruction upon this branch of the case, given at the request of the defendant was as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff executed the release of his claim shown in the evidence and that he signed said release (for a valuable consideration) without fraud or misrepresentation on the part of the manager of the defendant, they must find for the defendant."

It is further claimed that the trial court erred in giving at the request of the plaintiff the following instruction:

"The court instructs the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in no wise bars the plaintiff."

The chief objection urged to this instruction is that it places upon the defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. We do not think this objection is well taken. The instruction does not undertake to deal with the question of the burden of proof, and we do not

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think the defendant was prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at its own request.

This brings us to the last assignment of error, which is that the court refused to set aside the verdict of the jury as being contrary to the law and the evidence.

It is contended that there is no proof of the cause of the accident, but the evidence plainly tends to show that one of the cogs of the wheel was broken out and other cogs nicked and damaged; and that this condition caused the wheel to slip and break away from the control of the plaintiff. The question as to the cause of the accident and the manner of its occurrence was properly submitted to the jury, and under familiar rules this court will not interfere with its finding.

A further contention under this branch of the case is that, if the accident was due to the negligence of the defendant, the release heretofore mentioned operated as an accord and satisfaction. We have already seen that the question of the validity of this release was properly submitted to the jury and its finding in favor of the plaintiff upon that question is likewise binding upon this court.

There is no error in the judgment complained of and it must be affirmed.

Affirmed.

Mythville.

GAULDING v. VIRGINIAN RAILWAY COMPANY.

June 14, 1917.

Absent, Burks, J.*

1. CROSSINGS—*Railroad Crossing Private Land—Declaration.*—Code of 1904, section 1294-b (2) provides: "It shall be the duty of every railroad, canal or other public service corporation, whose road, canal, or works, passes through the lands of any person in this State, to provide proper and suitable wagon ways across said road, canal, or other works, from one part of said land to the other, and to keep such ways in good repair." In an action under this section the declaration of plaintiff alleged that the defendant, being the owner of a certain railroad running through the land of plaintiff, constructed an overhead bridge across its railroad to provide a means of passing from one part of the land to the other; that thereupon it became the duty of defendant to use reasonable care to keep and maintain the bridge in good repair; that defendant failed to perform its duty in that regard, and in consequence of such failure plaintiff suffered the damages laid in the declaration.

Held: That these allegations are substantially in the terms of the statute and state a good cause of action.

2. DECLARATION—*Sufficiency.*—The declaration referred to in the preceding headnote measures up to the requirement of the rule, that it must state a case, and set forth "the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment."
3. CROSSINGS—*Railroad Crossing Private Land—Declaration.*—The contention of defendant, that the declaration should also have alleged that defendant failed to provide or to keep up other suitable wagon ways is without merit, it appearing that only one suitable way was necessary, and that the defendant had supplied it in accordance with the statute. The breach of duty lay in the failure of defendant to keep the way in good repair. There being none other, the only breach that could be assigned

*Case submitted before Judge Burks took his seat.

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was with reference to the particular way in question. The duty to keep in good repair necessarily began when the duty to construct ended.

4. CROSSINGS—*Railroad Crossing Private Land*—Section 1294-b (2), Code of 1904.—If defendant had failed to comply with its statutory obligation to construct a sufficient number of wagon ways, plaintiff's remedy would have been to petition the circuit court for the appointment of commissioners to ascertain whether the additional ways asked for should be constructed, and not by action to recover damages.
5. CROSSINGS—*Railroad Crossing Private Lands*.—If defendant wished to escape liability for failure to keep the overhead bridge, as originally constructed, in good repair, it must have absolved itself from that duty by showing that it had in some lawful way been relieved of responsibility by providing other proper and suitable wagon ways.

Error to a judgment of the Circuit Court of Lunenburg county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Geo. E. Allen, for the plaintiff in error.

G. A. Wingfield and *H. T. Hall*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This case is before us on writ of error to a judgment of the Circuit Court of Lunenburg county, sustaining a demurrer to the declaration and dismissing the suit.

The action was brought under section 1294-b (2), Code of 1904, the pertinent portions of which are these: "It shall be the duty of every railroad, canal or other public service corporation, whose road, canal, or works, passes through the lands of any person in this State, to provide proper and

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suitable wagon ways across said road, canal, or other works, from one part of said land to the other, and to keep such ways in good repair."

The gravamen of the declaration is that the defendant, being the owner of a certain railroad running through the land of plaintiff, constructed an overhead bridge across its railroad to provide a means of passing from one part of the land to the other; that thereupon it became the duty of defendant to use reasonable care to keep and maintain the bridge in good repair; that defendant failed to perform its duty in that regard, and in consequence of such failure plaintiff suffered the damages laid in the declaration. The duty imposed by the statute upon the company is, first, that it shall provide proper and suitable wagon ways; and, second, that it shall keep such ways in good repair. The declaration alleges that defendant complied with the first obligation by constructing the overhead bridge, but avers that, having discharged that duty, it violated the second requirement of the statute in failing to keep the bridge in repair, by which breach of duty plaintiff suffered the damages for which he sues. These allegations are substantially in the terms of the statute, and state a good cause of action. The contention of defendant, that in addition thereto the declaration should allege that defendant failed to provide or to keep up other suitable wagon ways is without merit. It appears that only one suitable way was necessary, and that the defendant supplied in accordance with the statute. But the breach of duty, as we have seen, lay in the failure of defendant to keep the way in good repair. There being none other, the only breach that could be assigned was with reference to the particular way in question. The duty to keep in good repair necessarily began when the duty to construct ended. If defendant had failed to comply with its statutory obligation to construct a sufficient number of wagon ways, plaintiff's remedy would have been to petition the circuit court for the appointment of commissioners to

ascertain whether the additional ways asked for should be constructed, and not by action to recover damages. *Lanford v. Va. Air Line Ry. Co.*, 113 Va. 68, 73 S. E. 566.

If defendant wishes to escape liability for failure to keep the overhead bridge, as originally constructed, in good repair, it must absolve itself from that duty by showing that it has, in some lawful way, been relieved of responsibility by providing other proper and suitable wagon ways.

The declaration measures up to the requirement of the rule so often announced by this court, viz., that it must state a case, and set forth "the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment." *Burks' Pl. & Pr.*, 346, and cases cited.

Our conclusion is that the trial court erred in sustaining the demurrer to the declaration, for which error the judgment must be reversed, the demurrer overruled, and the case remanded for further proceedings.

Reversed.

Syllabus.

Mytherville.

GEHL v. BAKER.

June 14, 1917.

Absent, Burks, J.

1. ASSUMPSIT—*Pleas—Affidavit of Defense—Section 3286 of the Code—Waiver.*—Code of 1904, section 3286, provides that in an action of assumpsit on a contract, express or implied, for the payment of money, if the plaintiff file with his declaration an affidavit stating the amount of the plaintiff's claim, and that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea an affidavit denying plaintiff's right to recover, and that if such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration. A plaintiff may, either expressly or by implication, waive compliance on the part of the defendant with the requirements of this section, or may by his conduct be estopped from taking advantage of its terms. Consenting to, or accepting without objection, a continuance of the case, are familiar methods of waiving the provisions of the statute.
2. CONTINUANCE—*Consent.*—Plaintiff's counsel was notified by the judge of the court below that the leading counsel for defendant had been seriously injured, and the judge requested him to confer with the injured man in regard to the trial of the case at bar. The judge afterwards made a personal visit to defendant's counsel and found his condition such that it would be "utterly impossible for him even to go to the courthouse during the remainder of the term," and thereupon he informed him that his case would be continued to the next term, and directed the clerk to notify plaintiff's counsel that the case had been continued. Although there was time in which to object to the continuance, plaintiff's counsel wrote the judge thanking him for his consideration and referred to the fact that he had learned from the clerk and from defendant's associate counsel of the action of the court. In these communications there was

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nothing to indicate that plaintiff's counsel regarded the action of the court as unwarranted, or that he objected to it in any way.

Held: That the trial judge and defendant's counsel were well warranted in regarding the continuance as made with the consent of the plaintiff, or at least without objection on his part.

3. ASSUMPSIT—Section 3286, Code of 1904.—This statute was intended to prevent delay caused to plaintiffs by continuance upon dilatory pleas when no real defenses exist.

Error to a judgment of the Circuit Court of Northampton county, in an action of assumpsit. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

C. J. Collins and James E. Heath, for the plaintiff in error.

S. J. Turlington, Otho F. Mears, Jno. T. Daniel, T. J. Baker and J. W. Topping, for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is an action of assumpsit brought by N. V. Gehl against T. J. Baker, upon a contract which has been treated by both parties in the court below and in this court as a contract "for the payment of money" within the meaning of section 3286 of the Code of Virginia. In accordance with the terms of that section, the plaintiff filed with his declaration an affidavit stating the amount claimed to be justly due him and the date from which interest was demanded. There was no plea or appearance at rules, and the clerk, concededly by mistake, placed the case upon the docket with the cases standing upon a writ of inquiry instead of upon an office judgment.

The succeeding term of the court began at Eastville on the 13th day of September, 1915, and on that day, as was

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expected by counsel, the docket was called to ascertain what cases were to be tried by a jury and to fix the days therefor. It was known that the case of *Gehl v. Baker* would be contested, and that a trial was to be had, but no counsel for the plaintiff was present when the case was reached on the call, and the court set it for trial on the 21st day of the month. Later in the day, Mr. Bosman, an attorney representing the plaintiff's leading counsel, Mr. Heath, of Norfolk, appeared in court for the purpose of having the case set for the earliest day possible at that term. He was informed of what had already been done, and made no objection. Judge Fletcher, of the circuit court, certifies that Mr. Bosman left him under the impression that the date fixed would suit Mr. Heath, and that otherwise he would have set the case for another day.

On September 16th, Mr. Mears, the leading counsel for the defendant, was thrown from his buggy and seriously injured; and two days later, while Mr. Mears was in a Norfolk hospital for treatment, Judge Fletcher wired Mr. Heath as follows: "Mears in St. Christopher Hospital. Confer with him as to trial of Gehl against Baker case and wire." This telegram was received at Mr. Heath's office on the day of its date, but he was away and did not learn of its contents until his return home on the following night. He at once called the hospital, and, upon being informed that Mr. Mears had gone to his home in Eastville, concluded that Mr. Mears would be well enough to try the case on the 21st; and Mr. Heath had, accordingly, made all his arrangements to go to Eastville on the afternoon of the 20th, when he received a telegram from the clerk stating that the case had been continued on account of the illness of Mr. Mears. On the same day, September 20th, Mr. John T. Daniel, associate counsel with Mr. Mears, wired and wrote Mr. Heath to the same effect.

It appears also that, in the meantime, Judge Fletcher had made a personal visit to Mr. Mears at his home in East-

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ville, and found his condition such, from a broken arm and a severe attack of rheumatism, that it would be, to use Judge Fletcher's language, "utterly impossible for him even to go to the courthouse during the remainder of the term," and thereupon he informed Mr. Mears that all his cases would be continued to the next term; and it was at Judge Fletcher's direction that the clerk sent Mr. Heath the telegram stating that the case had been continued.

On the 21st of September, Mr. Heath wrote Judge Fletcher and thanked him for "his courtesy and consideration" in sending him the message of the 18th, and in his letter referred to the fact that he had subsequently learned from the clerk and from Mr. Daniel of the court's action in the premises; and on the same date he also wrote Mr. Daniel, thanking him most cordially for his letter and telegram. In these communications from Mr. Heath there was nothing to indicate that he regarded the action of the court as unwarranted, or that he objected to it in any way. The order of continuance was not actually entered until the 21st, the day set for the trial, and the term remained open to and including the 25th of September. Judge Fletcher assumed and believed, in view of the facts and circumstances above detailed, that the continuance was perfectly agreeable to counsel for plaintiff.

At the next term of the court, in November, the defendant asked leave to file certain pleas to the declaration. The granting of this request was opposed by the plaintiff on the ground that it was too late to set aside the office judgment, and that the court had no authority to allow any pleas to be filed, or to take any other action except to enter final judgment in his favor. At the instance of the defendant, argument on the questions thus arising was continued until the next term, in January, when the court overruled the plaintiff's motion for final judgment and permitted the pleas to be filed. A trial before a jury followed, resulting in a verdict and judgment for the defendant.

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The first assignment of error which we shall consider is that the court erred in refusing to enter up judgment in favor of the plaintiff.

In support of this assignment, counsel for plaintiff in error rely upon the decisions of this court in *Price v. Marks*, 103 Va. 18, 48 S. E. 499; *Gring v. Lake Drummond Company*, 110 Va. 754, 67 S. E. 360; and *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300. These cases are, in our opinion, distinguishable from the instant case, and they all expressly recognize the proposition that a plaintiff may, either expressly or by implication, waive compliance on the part of the defendant with the requirements of section 3286 of the Code, or may by his conduct be estopped from taking advantage of its terms. Consenting to, or accepting without objection, a continuance of the case, are familiar methods of waiving the provisions of the statute. *Jackson v. Dotson*, 110 Va. 46, 52, 65 S. E. 484; *Pollard & Haw v. American Stone Co.*, 111 Va. 147, 68 S. E. 266. In the present case we are of opinion that the trial judge and the defendant's counsel were well warranted in regarding the continuance as made with the consent of the plaintiff, or, at least, without objection on his part. In arguing against this view, the plaintiff in error, in his petition, says: "It is beside the mark to guess as to what counsel for the plaintiff would have done in regard to the continuance if he had been allowed to be heard." It is true that the court continued the case without any formal hearing on the part of the plaintiff; but there was time and opportunity for objection after notice to counsel, and the facts of the case do not warrant the conclusion that the plaintiff could not or would not have been heard upon the matter if he had so desired. The judge certifies that he would have heard any objection to the continuance, and that if the question as to the office judgment had been raised he would have protected the plaintiff in his rights. Nor do we think it is beside the mark to consider what counsel for the plaintiff would probably

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have done if a direct answer had been required of him as to the continuance. In determining, as we must here, whether the trial court and the counsel for the defendant had the right to assume that a highly technical point, in no way affecting the substance of the real controversy which both sides expected to be tried, was being waived by counsel for the plaintiff, it is quite material to consider what an attorney might have been expected to do under the circumstances. The statute in question was, as this court has repeatedly held, intended to prevent delay caused to plaintiffs by continuances upon dilatory pleas when no real defenses exist. In the present case, as was said by Judge Whittle in *Pollard & Haw v. American Stone Co.*, *supra*, "it is not possible to escape the conclusion that it was understood and agreed, both by the court and counsel, that the case was to be tried upon its merits and not to go off on an office judgment." Consent to the continuance was to be expected from the nature of the controversy and the situation of counsel; it was inferable from the letters of counsel for plaintiff written some days before the court adjourned for the September term; and the fact that such consent was understood by the court and opposing counsel as tacitly given, appears affirmatively from the record.

We are of opinion, therefore, that the plaintiff in error must be held to have waived the point upon which he now seeks to have the court enter up a final judgment in his favor.

The second assignment of error, and the only other one to which it will be necessary to advert, challenges the ruling of the court upon the admission of certain testimony offered by the defendant. At the oral argument it was conceded by counsel for the defendant that this assignment was well founded and must result in a reversal.

The judgment will be reversed, the verdict of the jury set aside, and the cause remanded to the circuit court for a new trial.

Reversed.

Statement.

Mythreville.

GOOCH V. OLD DOMINION TRUST COMPANY.

June 14, 1917.

Absent, Prentis and Burks, JJ.

1. TRUSTS AND TRUSTEES—*Jurisdiction of Equity—Bill of Conformity.*—As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealings with the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they are entitled to direction and instruction from the court. Whenever a case occurs which justifies the proceedings, trustees, by bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event.
2. APPEAL AND ERROR—*Bill of Conformity—Violation of Supersedeas.*—A bill of conformity filed by the curator of an estate, praying the instruction and guidance of the court in the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges cannot be safely disposed of except by the direction of the court, in nowise contravenes a supersedeas order in a collateral suit involving the estate. The object of the bill is to preserve the property of the estate pending litigation for whomsoever shall ultimately be adjudged the rightful owner. Such is the common practice with trial courts in this jurisdiction.

Appeal from a decree of the Circuit Court of Mecklenburg county. Decree for complainant. Defendant appeals.

Affirmed.

Opinion.

The opinion states the case.

Buford & Peterson, S. E. Williams and C. T. Baskervill,
for the appellant.

S. S. P. Patteson and H. M. Smith, Jr., for the appellees.

WHITTLE, P., delivered the opinion of the court.

This suit is nearly related to the case of *Margaret Radcliffe Gooch v. Annie W. Suhor*, in which an opinion affirming the order of the Circuit Court of Mecklenburg county has been handed down at the present term. The Old Dominion Trust Company, as curator of the estate of W. H. Gooch, deceased, filed its bill of conformity against the widow, Margaret Radcliffe Gooch, and Annie Wayne Suhor, the only child of decedent, and her husband George L. Suhor, praying the instruction and guidance of the court in the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which plaintiff alleges cannot be safely disposed of except by the direction of the court.

The case was heard and determined on the bill and a supplemental petition setting up additional facts confronting plaintiff in the management of the estate, and on the answers of Mrs. Gooch both to the bill and petition and exhibits filed with the pleadings. From a decree taking jurisdiction of the case and granting the relief prayed for, this appeal was granted.

Though there was no demurrer to the bill or petition, yet the answers challenge the right of the plaintiff to maintain the suit and the jurisdiction of the court to grant the relief awarded by the decree, or, indeed, to grant any relief upon the case made by the pleadings.

The bill, among other things, alleges: (1) That plaintiff has collected \$40,000 in cash from doubtful securities, and

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that debts to the amount of more than \$50,000 have been filed with it for payment, but that plaintiff believes it has no authority to pay debts, except, perhaps, funeral expenses and tax bills, because the estate is involved in litigation over the antenuptial contract between W. H. Gooch and Margaret R. Gooch, one branch of which is pending in the Supreme Court of Appeals of Virginia, and another in the United States District Court for the Eastern District of Virginia, and plaintiff cannot undertake to determine the rights of the respective parties to that litigation; (2) that nearly all the real estate, consisting of a number of separate tracts of land situated in Mecklenburg county, Virginia, at the time of the death of W. H. Gooch was leased to different tenants for part of the crop; that none of these leases is in writing, and all will expire on January 1, 1917; that it is to the interest of all parties that these leases shall be renewed, yet, in view of the litigation referred to, plaintiff is not advised as to what its duty is in the premises; that the present tenants are insisting that they be informed at once whether they will be permitted to renew their leases and continue as tenants on the same terms as they had with W. H. Gooch for another year, or will have to seek other farms; still, unless plaintiff shall be instructed by the court as to his duty, it does not know what course to pursue with respect to that property; (3) that Mrs. Gooch has notified plaintiff that it will be held responsible for more than 3% interest on the balance in its hands; that 3% is the usual bank rate for court funds, and plaintiff has no power to invest the sums received by it, but stands ready to carry out the court's instruction as to what disposition it shall make of the same; that in connection with its trust business, plaintiff maintains a banking department, in which the balance is now on deposit, but it will be placed in other banks if the court shall deem it best to do so. (4) The supplemental petition calls the court's attention to the fact that, while the funds referred to in the last paragraph are yielding only

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3%, the debts against the estate bear 6% interest, and plaintiff suggests that it would be beneficial to the estate to pay the debts so far as such payments may not affect priority in the order of payment prescribed by the statute.

(5) The next paragraph of the petition describes ten separate tracts of land, concerning the leasing of which plaintiff invokes the guidance of the court. (6) Plaintiff also draws attention to certain perishable property, and advises the expediency of the court authorizing immediate sale thereof. (7) Plaintiff requests that, in addition to the inquiries already directed, the commissioner shall be required to report: (a) What debts, if any, in order to conserve the best interest of the estate, should now be paid; and (b) whether the payment of such debts will affect the priority in the order of payment prescribed by law, and, if so, how.

As remarked, appellant controverts the proposition that any or all of the matters alleged confer jurisdiction upon the court under the pleadings, and strenuously protests against mulcting her interest in the estate with any part of the expense or cost of the litigation. She also insists that the institution and prosecution of this suit violates the supersedeas order in the case now pending in this court. We shall briefly consider these two contentions in the order in which they occur.

1. We have nowhere found the rule with respect to the right of a trustee or other fiduciary to file a bill of conformity invoking the assistance of a court of equity in the administration of his trust, and the reason for the doctrine, more clearly stated than in Perry on Trusts and Trustees. The learned author at section 476-a observes: "As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealings with the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they

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are entitled to direction and instruction from the court * * * Whenever a case occurs which justifies the proceedings, trustees, by bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event. It would be a harsh rule to hold the trustee for an error of the court." 2 Perry on Trusts and Trustees (6th ed.), sec. 476-a.

The doctrine of the text is in harmony with the rule of procedure in this State, and is sustained by the uniform course of decision in this court. *Osborne v. Taylor*, 12 Gratt. (53 Va.) 117, 122-123; *Faulkner v. Davis*, 18 Gratt. (59 Va.) 651, 677-8; 98 Am. Dec. 698; *Leake's Ex'or v. Leake*, 75 Va. 792, 800; *Christian v. Worsham*, 78 Va. 100; *Schroeder v. Woodward*, 116 Va. 506, 527, 82 S. E. 192; *Shepherd v. Darling*, 120 Va. 586, 91 S. E. 737.

In the last named case, decided March 15, 1917, Kelly, J., in delivering the opinion of the court, at p. 453, says: "Although the contention is made by the appellants that Schmelz, as surviving executor, did not have the power to sell the property without an order of court, we are of opinion that, under the plain provisions of the will, he clearly did have this power, and that the same was not in any way affected or diminished by the previous proceedings in the above-mentioned suit of *McMenamin's Ex'or v. McMenamin, et al.* But it is equally true that, as executor and trustee, he had the right, notwithstanding such power, to go into a court of equity for advice and instruction upon the proposition. Having taken that course in good faith, as we think the evidence shows he did, he is fully protected by the order of the court under which he acted. 2 Min. Inst. (4th ed.), p. 256; 2 Pom. Eq. Jur., sec. 1064; 21 Cyc. 88."

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There is no question on our mind of the good faith of the plaintiff in bringing this suit, and the power of the court to entertain the bill and grant the relief accorded by the decree under review is fully sustained by the authorities.

2. The remaining contention is founded upon misapprehension of the purpose of the suit. It in no wise contravenes the supersedeas order in the case of *Margaret R. Gooch v. Annie W. Suhor*, but its object is to preserve the property of the estate pending litigation, for whomsoever shall ultimately be adjudged the rightful owner. Such is the common practice with trial courts in this jurisdiction. *Cralle v. Cralle*, 81 Va. 773; *Atkins v. Edwards*, 83 Va. 316, 2 S. E. 439; *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. 946, 947.

The decree appealed from is without error and is affirmed.

Affirmed.

Syllabus.

Mytherville.**GOOCH V. SUHOR.**

June 14, 1917.

Absent, Prentis and Burks, JJ.*

1. **EXECUTORS AND ADMINISTRATORS—*Who May Be Appointed—Antenuptial Settlement.***—Plaintiff in error by an antenuptial settlement relinquished all her marital rights to her husband's property, therefore, unless and until the settlement is cancelled and annulled, neither she nor any other person designated by her, has the right of administration of his estate under section 2639 of the Code of 1904.
2. **MARRIAGE SETTLEMENTS—*Jurisdiction—Probate—Equity.***—The probate jurisdiction of clerks and the Virginia courts is purely statutory; and the statute bestowing the authority defines the limits of its exercise. The statute confers no general equity jurisdiction; and a court of probate has no jurisdiction over marriage settlements unless conferred by statute. At a very early period controversies touching marriage settlements came under the jurisdiction of the equity courts, because such agreements were unenforcible at common law. The appropriate procedure in equity in such case is either by a bill of specific performance of the contract, or for rescission, according to the exigencies of the particular case.
3. **MARRIAGE SETTLEMENTS—*Jurisdiction—Probate—Equity.***—Where the court was not exerting its general equity jurisdiction, but merely discharging the limited functions of a probate court in the matter of appointing an administrator or curator for an estate, it was plainly right in refusing to take cognizance of a dispute over the validity of an antenuptial agreement.
4. **MARRIAGE SETTLEMENTS—*Jurisdiction—Pleading.***—Where the petition of plaintiff in error to be permitted to qualify as administratrix, and attacking the validity of her antenuptial settlement, neither made parties nor prayed that those representing adverse interests to the petitioner might be convened, and no process was awarded or issue joined thereon, and concluded with the request that if the court should be of opinion that it was without jurisdiction to pass upon the validity of the

*Case submitted before Judge Burks took his seat.

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antenuptial agreement in the probate case, it would appoint her nominee curator of the estate pending proceedings by her to determine the validity of the contract, the state of the pleadings was prohibitive against the assumption by the court of jurisdiction to determine the validity of the antenuptial settlement. The petition was not a pleading either in form or substance, but a mere motion in writing or application to the court that plaintiff in error, or her nominees, be allowed to administer on the estate.

5. EXECUTORS AND ADMINISTRATORS—*Curator*.—There is not necessarily any incompatibility in the office of trustee under an antenuptial settlement and that of curator of the estate of the deceased husband, pending the determination of the validity of the antenuptial settlement.
6. APPEAL AND ERROR—*Harmless Error—Dismissal of Petition Without Prejudice*.—Plaintiff in error applied for appointment as administratrix for herself, or her nominees, which application was refused by the clerk. She thereupon filed her petition in the Circuit Court, in which she insisted that her marriage settlement had been procured by fraudulent representations and was void, and renewed her motion to be permitted to qualify as administratrix. The petition contained the alternative prayer, that if administration should be denied her, it might be granted to her nominees. The concluding prayer of the petition was that, if the court should be of the opinion that it was without jurisdiction in that proceeding to pass upon the validity of the marriage contract, it would appoint plaintiff in error's nominees, or one of them, curator of the estate pending proceedings by her to determine the validity of the agreement.

Held: That the action of the court in dismissing the petition, but without prejudice to the rights of the plaintiff in error to test the validity of the marriage contract in a proper proceeding before a court of competent jurisdiction, if erroneous at all, was harmless error.

Error to an order of the Circuit Court of Mecklenburg county, denying the prayers of plaintiff in error to be permitted to qualify as administratrix, and asking that the marriage settlement made by her be set aside as fraudulent.

Affirmed.

The opinion states the case.

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Buford & Peterson, C. T. Baskervill and S. E. Williams,
for the plaintiff in error.

S. S. P. Patteson and H. M. Smith, Jr., for the defendant
in error.

WHITTLE, P., delivered the opinion of the court.

The dominant question presented by this writ of error involves the right of the plaintiff in error, Margaret R. Gooch, to administer on the estate of her deceased husband, W. H. Gooch, which right was denied her by the order under review. The determination of that issue depends upon a few controlling facts about which there is no room for disagreement.

W. H. Gooch, a man around fifty years of age, a resident of Clarksville, Mecklenburg county, Virginia, was married to Margaret Radcliffe, who was in her twenty-fourth year, on the morning of October 14, 1915, at the residence of her mother in Lexington, North Carolina. On the same day, but before the marriage ceremony was performed, the parties and their trustee, the Old Dominion Trust Company, executed and acknowledged a marriage contract, the general terms of which had previously been the subject of negotiation between them, whereby W. H. Gooch covenanted and agreed that he would cause to be paid to the trustee, within one year after his death, for his intended wife, if then living, \$50,000, to be held in trust, and the principal to be invested in such way as the trustee should deem best, for the sole use and benefit of the second party as long as she remained unmarried and the widow of W. H. Gooch; and pay to her from time to time all net income, dividends or other yearly proceeds arising therefrom; and upon her marriage or death should pay the principal sum in such manner as W. H. Gooch by his last will and testament might appoint, or, for want of such appointment, to

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his children and the lawful issue of such of them as might have died, share and share alike. In consideration of the premises, and that the contemplated marriage should be consummated, Margaret Radcliffe agreed with W. H. Gooch, his executors, administrators and heirs, that upon his death she would receive the \$50,000, so to be held in trust for her benefit, in satisfaction of all rights of dower in his estate, and in full of all other rights, interests, claims or allowances in law or in equity, in his estate, real or personal, which she might or could have, or would be entitled to but for that agreement; and that upon the payment of the agreed sum to the trustee according to the stipulation of the agreement, she would release, quit claim and discharge the representatives and heirs of W. H. Gooch of and from all her interest in the estate. This contract was recorded in North Carolina and in Mecklenburg county, Virginia. Immediately after the marriage, the parties set out on their bridal tour to San Francisco. On the homeward journey, early on the morning of the 14th of November, 1915, while the train was at Weimar, in Texas, W. H. Gooch was killed in their apartment on the train by a pistol shot, alleged to have been self-inflicted.

Deceased died intestate, and was survived by the plaintiff in error, Margaret Radcliffe Gooch, and the defendant in error, Annie Wayne Suhor, the only child of W. H. Gooch and Lucy A. Gooch, his former wife from whom he had been divorced.

On December 15, 1915, Annie Wayne Suhor paid to the Old Dominion Trust Company, as trustee for the plaintiff in error, \$50,000, in pursuance of the marriage contract. On November 18, 1915, J. H. Gooch, a brother of the decedent was appointed by the clerk of Granville county, North Carolina, administrator of the estate in that State; and, afterwards, he was also appointed by the clerk of Mecklenburg county administrator of the estate in Virginia. Plaintiff in error likewise had applied for appoint-

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ment as administratrix for herself, or her nominees (which application was refused by the clerk), and she thereupon filed her petition in the Circuit Court of Mecklenburg county, in which she insisted that the marriage contract had been procured by fraudulent representations and concealment and was void, and renewed her motion to be permitted to qualify as administratrix. The petition contained the alternative prayer, that if administration should be denied her, it might be granted to her nominees, either the Virginia Trust Company, of the city of Richmond, Virginia, or R. M. Hester, of Mecklenburg county. The concluding prayer of the petition is that, if the circuit court should be of opinion that it was without jurisdiction in that proceeding to pass upon the validity of the marriage contract, it would appoint the Virginia Trust Company or R. M. Hester, or both, curator of the estate pending such proceeding as she might institute in a court of competent jurisdiction to determine the validity of the agreement.

The order of the circuit court disposed of the different phases of the controversy as follows:

1. It denied the prayer of the petition to grant administration either to the widow or her nominees.

2. It determined that the court was without jurisdiction in that proceeding to pass upon the validity of the marriage contract, and dismissed the petition, but without prejudice to the right of the widow, or of any distributee, or personal representative, to test the validity of the marriage contract in a proper proceeding before a court of competent jurisdiction.

3. It reversed the order of the clerk appointing J. H. Gooch administrator; and

4. It appointed the Old Dominion Trust Company of Richmond, Virginia, curator of the estate.

The ruling of the court setting aside the order of the clerk appointing J. H. Gooch administrator is not assigned

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as cross-error under rule VIII, and, therefore, does not demand further notice.

Plaintiff in error relies upon the following assignments of error to reverse the order under review:

1. "The court erred in declining to entertain jurisdiction of petitioner's motion to determine the incidental questions arising as to the validity of said alleged antenuptial agreement."

2. "The court erred in overruling petitioner's motion and declining to appoint her administratrix of the personal estate of the decedent, or to allow her to designate the appointee."

3. "The court erred in appointing the Old Dominion Trust Company curator of the estate, for the reason that it is a party to said alleged agreement, and, therefore, an unfit person for the position of curator of the estate."

4. "The court erred in dismissing petitioner's motion, thereby terminating the controversy respecting the appointment of an administrator, and then appointing a curator, the court having no authority to appoint a curator except to preserve the estate during the pendency of such controversy."

We shall direct our attention to the first assignment of error, because if the circuit court, in exercising a purely probate function in pursuance of statutory authority, and in the state of the pleadings and the parties at that time, rightly declined to take jurisdiction of the controversy concerning the validity of the antenuptial contract, then, demonstrably, there is no reversible error in the remaining assignments. For, as we have seen, the plaintiff in error, by the antenuptial settlement (which has been fully executed so far as the estate is concerned by payment of the \$50,000 to the trustee) relinquished all her marital rights to her husband's property. Therefore, unless and until the settlement is cancelled and annulled, neither the widow nor

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any other person designated by her has the right of administration of the estate under section 2639 of the Code. *Charles v. Charles*, 8 Gratt. (49 Va.) 487, 56 Am. Dec. 155. See also, *Smith v. Lurty*, 107 Va. 548, 59 S. E. 403; *Tompkins Admr. v. Poff*, 120 Va. 162, 90 S. E. 630.

The probate jurisdiction of clerks and the Virginia courts is purely statutory; and the statute bestowing the authority defines the limits of its exercise. The statute confers no general equity jurisdiction; and "a court of probate has no jurisdiction over marriage settlements unless conferred by statute." 21 Cyc. 1242, n. 6, citing *Whitfield v. Hurt*, 31 N. C. 170.

At a very early period controversies touching marriage settlements came under the jurisdiction of the equity courts, because such agreements were unenforcible at common law. For a general discussion of this subject, see 21 Cyc. 1242, *et seq.* The appropriate procedure in equity in such a case is either by a bill for specific performance of the contract, or for rescission, according to the exigencies of the particular case. An instructive review of the principles governing marriage contracts, and the leading authorities, including the decisions of this court on the subject, will be found in 13 R. C. L., p. 1011, *et seq.* See p. 1042, sec. 62.

In the circumstances narrated the circuit court was plainly right in refusing to take cognizance of the dispute over the validity of the antenuptial agreement. As we have seen, the court was not exerting its general equity jurisdiction, but merely discharging the limited functions of a probate court in the matter of appointing an administrator or curator for the estate. Besides the general rule of law, which forbade the court to assume jurisdiction, the state of the pleadings was likewise prohibitive. The petition presented by the plaintiff in error neither made parties nor prayed that those representing adverse interests to the

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petitioner might be convened, and no process was awarded or issue joined thereon. As a matter of fact, the petition was not a pleading either in form or substance, but a mere motion in writing or application to the court that Margaret R. Gooch, or her nominees, be allowed to administer on the estate. Indeed, the petition concludes with the request that if, for any reason, the court should be of the opinion that it was without jurisdiction to pass upon the validity of the antenuptial agreement in the probate case, it would appoint her nominee curator of the estate pending such proceedings as she might institute in a court having competent jurisdiction of the subject matter and the parties to determine the validity of the contract.

It thus appears that the plaintiff in error's real grievance is not over the appointment of a curator for the estate, but is traceable to the court's refusal to select her nominee for that office. The circuit court, under the circumstances, correctly refused to appoint the plaintiff in error's nominee, for the same reason that it denied her the right of administration. Moreover, the record vindicates the wisdom and propriety of the selection and appointment of the Old Dominion Trust Company as curator. The company is of unquestioned solvency, and promptly executed bond with security for the faithful discharge of its duties. And besides, the established reputation of the company for business ability and integrity afforded additional assurance that the interests of all concerned in the ultimate outcome of the litigation would be protected.

We do not appreciate the force of the suggestion that there is necessarily any incompatibility in the office of trustee in the antenuptial agreement, and that of curator of the estate of W. H. Gooch, deceased. Nor have we discovered any evidence in the record tending to show that the Old Dominion Trust Company is unsuitable for appointment to either position. If the antenuptial contract shall finally be upheld, then plaintiff in error will have no in-

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terest in the estate, since the amount settled upon her has already been paid to her trustee. On the other hand, if she shall succeed in having the contract rescinded, then the estate will be in the hands of a reputable, solvent and bonded officer, ready to be delivered to those entitled to receive it.

It is impossible from an inspection of this record to fail to perceive that many, if not all, of the assignments of error involve issues that have not been finally decided, and which, if eventually resolved in favor of the plaintiff in error, would leave her without any just ground for complaint.

The fourth assignment of error, involving the action of the court in dismissing the petition, if erroneous at all, is harmless error, since the dismissal was without prejudice to petitioner's rights.

Without further prolonging this opinion or reviewing authorities which do not affect the questions now before us, we are of opinion that there is no reversible error in the order under review, and it is affirmed.

Affirmed.

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Mytherville.**GRAVATT v. LANE.**

June 14, 1917.

Absent, Burks, J.

1. **BOUNDARIES—Landmarks and Acreage—Construction of Deed.**—Definitely established landmarks fixed by the parties, or by the conveyance, will always prevail over acreage.
2. **EJECTMENT—Construction of Deed.**—In an action of ejectment, where it appears that the purpose of the parties to a deed was to make an equitable partition of a larger tract of land, a verdict of the jury sustaining a line established by definite landmarks set out in the deed will not be disturbed, where the line thus ascertained by the jury to be the true line makes a fair partition of the property and vests in the grantee of the deed at least 200 acres of the land, whereas the deed estimated his proportion of the land to be only 150 acres. And this notwithstanding the contention of the grantee that the deed to him only reserved 43 acres of the larger tract, and that the line between the two tracts should be surveyed so as to carry out this purpose. The tract was believed to contain about 196 acres, but in fact contained 258 acres.
3. **EJECTMENT—Outstanding Deed of Trust.**—An outstanding unsatisfied mortgage or deed of trust on land to secure a debt is regarded as a mere lien, and the mortgagor or grantor may still maintain ejectment in his own name, and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action. While technically the legal title is in the trustee, it is only vested in him for a definite purpose, namely, to secure the debt. Such a deed should be construed in actions of ejectment as a mere lien upon the property.

Error to a judgment of the Circuit Court of Orange county, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Affirmed.

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The opinion states the case.

E. H. DeJarnette, Jr., and George L. Browning, for the plaintiff in error.

Alex. T. Browning and V. R. Shackelford, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

J. E. Gravatt complains of a verdict and judgment in favor of A. A. Lane in an action of ejectment.

The pertinent facts are, that Oliver Terrill died, leaving to his heirs at law a tract of land in Orange county, which was believed to contain about 196 acres. Upon actual survey made long after the conveyances here involved were executed, it was found to contain 258 $\frac{5}{6}$ acres, or an excess of more than 62 acres. F. W. Terrill, one of the heirs at law, acquired the title of the other heirs at law, including the interest of Lillie Hammes, who owned an undivided $\frac{1}{18}$ therein as one of the heirs at law of Oliver Terrill, she being his granddaughter, and that of E. C. Terrill, a son of Oliver Terrill, who inherited an undivided $\frac{1}{6}$ interest therein.

On the 17th day of October, 1903, F. W. Terrill and his wife conveyed to Gravatt, the plaintiff in error, all his "right, title and interest" in and to the tract of land referred to, except the interests of E. C. Terrill and Lillie Hammes, the title to which he apparently held for their benefit. This deed describes the property intended to be conveyed as follows: "Beginning at a point on the north side of plank road, a corner to Wm. H. Camper and wife, thence along said plank road to a corner at or near R. H. Rogers' farm gate, thence in a straight line to old turnpike, to a point in line of Adra S. Taylor and others running from turnpike to plank road at blacksmith's shop, thence

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on north side of said road to new corner at R. H. Rogers' farm gate, thence with the line of Adra S. Taylor's estate and Charles C. Taliaferro to a corner with John Jerdone's estate, and thence with the line of said Jerdone's estate and Wm. H. Camper and wife to the beginning and containing one hundred and fifty acres, be the same more or less."

It appears from the evidence that the manifest intent and purpose of this deed was to make a partition of the said land so as to sever the interest of Lillie Hammes and E. C. Terrill from the residue of the tract, and to vest the title to such residue in Gravatt. The evidence also clearly shows that at that time it was supposed that the tract contained from 190 to 196 acres. The division was made upon the theory that the combined shares of Lillie Hammes and E. C. Terrill would be 43 acres thereof, and that Gravatt should have about 150 acres, or the residue thereof. Thereafter F. W. Terrill, by two deeds, both of which are dated and acknowledged on the 14th of March, 1910, conveyed to Lillie Hammes all the original tract which had been retained by him, one deed purporting to convey 12 acres, more or less, and the other 40 acres, more or less; and Lillie Hammes afterwards conveyed the same to the defendant in error, Lane.

The controversy arises as to the true construction of the deed of the 17th of October, 1903, from F. W. Terrill and wife of J. E. Gravatt. Gravatt contends (and there is much reason in the contention) that the deed to him only reserves 43 acres, and that the line between the two tracts should be surveyed so as to carry out this purpose. On the other hand, it is claimed by Lane that the deed was intended to make a fair partition of the entire tract; that the deed clearly fixes the new corner between the two parcels of land at R. H. Rogers' farm gate; that it prescribes that the line between this new corner and the point in the line of Adra S. Taylor's estate on the old turnpike shall be a straight line; that at the time of the execution of the deed the point

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in the line of Adra S. Taylor's estate was agreed upon and fixed by the parties interested, in order to secure to Lillie Hammes certain arable land upon that side of the tract; and that the location of these corners, one at Rogers' farm gate and the other in Taylor's line, establishes the line between the land reserved and the land conveyed to Gravatt. The verdict of the jury sustains this latter contention.

When it is remembered that the purpose of the parties was to make an equitable partition of the Oliver Terrill tract; that it is well settled that definitely established landmarks fixed by the parties, or by the conveyance, will always prevail over acreage; that the line thus ascertained by the jury to be the true line makes a fair partition of the property and vests Gravatt with at least 200 acres, whereas the deed estimates his proportion of the land to be only 150 acres, and that the question involved was fairly submitted to the jury; it seems clear that this court ought not to disturb the verdict.

The justice of this view is strengthened by the fact that Gravatt was one of the heirs at law of Oliver Terrill; that neither Lillie Hammes nor E. G. Terrill were parties to the conveyance to Gravatt; and that F. W. Terrill's intention was to make a fair partition of the property. In order to sustain the contention of Gravatt, it would be necessary either to change the point on the old turnpike in the line of Adra S. Taylor's estate, which point has been agreed upon by the parties ever since the conveyance was made, or to disregard the express terms of the deed which establishes the other new corner at R. H. Rogers' farm gate. To change one of these points would violate the terms of the deed, and to change the other, the avowed intention of the parties.

The evidence submitted is sufficient to sustain the verdict and judgment.

2. Another reason which is urged for setting aside the verdict is, that it appears that there is outstanding an un-

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satisfied deed of trust from Lillie Hammes and her husband to secure a debt of \$250 to E. H. DeJarnette, which constitutes a lien on the property, and that the existence of this deed is a bar to the maintenance of this action.

This question has never been definitely decided in this State. The great weight of authority, however, is that an outstanding unsatisfied mortgage or deed of trust on land to secure a debt is regarded as a mere lien, and that the mortgagor or grantor may still maintain ejectment in his own name, and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action. Burks' Pl. & Pr., p. 196.

"So a defendant in ejectment cannot set up an outstanding mortgage in the hands of a third person to defeat the title of the mortgagor, or his heirs. And this rule is not affected by the fact that the mortgage was in the form of an absolute conveyance with a separate defeasance back." 15 Cyc. 70.

See also 9 R. C. L. 871; Newell on Ejectment, secs. 19, 20; *Benton Land Co. v. Zeitler*, 182, Mo. 251, 81 S. W. 193, 70 L. R. A. 95.

In the case of *Hopkins v. Ward*, 6 Munf. (20 Va.) 38, this court decided that where land has been conveyed in trust to a trustee to hold for the benefit of a third person, the beneficiary, after the purpose of the trust has been satisfied, may maintain an action of ejectment in his own name, though the legal estate is still in trust.

In *Lynchburg Cotton Mill Co. v. Rives*, 112 Va. 137, 70 S. E. 542, it is held that section 2742 of the Code—which declares, "The payment of the whole sum * * * which any deed of trust may have been made to secure * * * shall prevent the grantee, or his heirs, from recovering at law by virtue of such * * * deed of trust, property thereby conveyed, wherever the defendant would in equity be entitled to a decree re-vesting the legal title in him,

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without condition,"—prevents a trustee in a deed of trust to secure a debt which has been satisfied from maintaining an action of ejectment for the land conveyed.

We perceive no sufficient reason on principle for a different rule, even though the debt has not been satisfied. While technically the legal title is in the trustee, it is only vested in him for a definite purpose, namely, to secure the debt. Such a deed should be construed in actions of ejectment as a mere lien upon the property. This view is in accord with reason and the great weight of authority, and has the approval of this court.

Judgment Affirmed.

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Mytherville.**HENRY MYERS & COMPANY V. LEWIS.**

June 14, 1917.

Absent, Burks, J.*

1. **PROCESS—Verification of Return—Service on Non-Residents.**—To a return of process against non-residents was attached an affidavit of a notary to the effect that the person serving the process appeared before him in person and made oath that the statements made in the return were true. The trial court correctly ruled that such return was under oath, as required by section 3232, Code of 1904, the affidavit accompanying the return evidencing the fact.
2. **ATTACHMENT—Motion to Quash—Validity of Demand.**—The question of the validity of the debt or demand of the plaintiff, i. e., whether it is or is not established does not arise upon a preliminary motion to quash the attachment, but only when the case is heard upon its merits. Consequently, the question of the liability of a partnership for torts of one of the partners is not within the scope of a motion to quash an attachment, but must be determined when the case comes up for trial on its merits.
3. **MASTER AND SERVANT—Agency—Partnership—Liability of Master, Principal or Partner for Torts of Agent, Servant or Partner.**—Where there is neither express authority in advance nor ratification afterwards, the test of the liability of the master or principal for the tortious act of the servant or agent, is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a nontortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the tortious manner in which a transaction is conducted or a ser-

*Case submitted before Judge Burks took his seat.

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vice is performed by his servant or agent, entrusted by the former to the latter to be conducted or performed for him in a nontortious manner. The same is true, of course, with respect to the liability of a partnership for a tort of an individual partner.

4. **PRINCIPAL AND AGENT—*Ratification—Torts.***—Mere ratification is not itself a test of liability of one for the tortious act of another, much less is the receipt of a benefit from the tortious act such test, which in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification is material as bearing upon the measure of damages, but is not a true test of original liability. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment?
5. **PARTNERSHIP—*Libel and Slander—Liability of Partnership for Libel Published by One of the Partners—Damages.***—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence.
6. **INSTRUCTIONS—*Not Based on the Evidence.***—An instruction is properly refused, where there is no evidence to support it, and it is contrary to all the evidence on the subject.
7. **PARTNERSHIP—*Libel and Slander—Exemplary Damages.***—Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages.
8. **PARTNERSHIP—*Libel and Slander—Exemplary Damages—Appeal and Error—Harmless Error.***—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless.
9. **APPEAL AND ERROR—*Invited Error.***—Where an error of the trial court in instructing the jury as to the liability of defendants for exemplary damages was invited by an instruction asked

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for by the defendants and given by the court, containing the same error, and the case was tried in the court below, on this point, as asked for by both parties, defendants as well as plaintiff, it is too late for the defendants to avail themselves of the error in the appellate court.

10. **APPEAL AND ERROR—Harmless Error.**—If it does not affirmatively appear that the error in question is injurious, it must be regarded as harmless.
11. **LIBEL AND SLANDER—Damages.**—Where a libel is actionable *per se*, plaintiff is entitled to recover substantial, and even punitive damages, without any proof of particular instances of special damage. The law presumes general damages where the libel is actionable *per se*.
12. **LIBEL AND SLANDER—Damages—Cross-Examination.**—If defendants, in an action for libel, are not content to let the case stand upon the general damages presumed by law, but wish to rebut this presumption by questioning plaintiff on cross-examination as to what actual injury plaintiff had in fact sustained by the libel, they have the right to do so, in diminution of damages. But having asked the question, they cannot object to an answer in direct response to the question.

Error to a judgment of the Hustings Court, Part II, of the city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is a civil action of J. H. Lewis, a retail merchant, defendant in error (plaintiff in the court below) against the plaintiffs in error (defendants in the court below), a manufacturing and mercantile partnership, composed of two partners, Louis Jandorf and Sydney Greenbaum, for damages for a libel contained in a certain letter written to the said Lewis by one of said partners, signing the partnership name to the letter, in the absence of and without the knowledge of the other partner of this particular act at or before it was done, and an ancillary attachment at law.

The declaration contains two counts, one laying the action at common law for libel affecting the plaintiff, Lewis,

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in his trade and business, the other under the statute in Virginia for insulting words.

The letter was as follows:

"Baltimore, Md., August 11, 1913.

"J. H. Lewis,

"Dear Sir:

"The two cases of shirts which you returned we have instructed the R. R. Co. to put same in the public storage warehouse in Baltimore, and when the bill comes due we will look to you for payment of same, and if bill is not paid when due we will place with our attorney, Ellis Stern, in Richmond, and will put you before the merchants the class of man which J. H. Lewis is, and it will be Henry Myers & Co. who will do so, as we think you are one of the most unprincipled merchants in Richmond. We do not want to sell you any more, and have instructed our salesman not to call on you.

"Respectfully yours,

(Signed) "Henry Myers & Co."

This letter was written by the defendant partner, Louis Jandorf, in the absence of the other defendant partner. Jandorf was intrusted with the conduct of the partnership correspondence in the absence of his partner. The letter was written, as appears from the letter itself, with *the purpose* of benefiting the partnership, in that its object was to induce the payment by the plaintiff Lewis of a bill for goods sold and shipped to him by the defendant partnership. It was written in the ordinary course of business—in the ordinary conduct of the correspondence—of the partnership. It was written in the name of the partnership—the latter being signed thereto. The further threat and proceeding to put plaintiff "before the merchants the class of man" he was said in the letter to be, was to be done by the partnership, according to such letter. The writing of the letter

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itself was within the partnership authority of Jandorf but the manner in which he wrote it, in this, his use of the libelous words therein, was an act in excess of his partnership authority, in the sense that the partnership was not organized to, nor was it ever within the contemplation of the partners that it would, engage in the business of writing libels or in committing any other tort.

There were other letters, both of plaintiff, Lewis, and the defendant partnership, written to each other, before and after the letter above copied, which are immaterial to the decision of the case upon the points presented to us by the assignments of error. There is one other letter which is material, however, written on September 4, 1913, twenty-four days subsequent to the letter above copied. Such other letter is as follows:

“September 4th, 1915.

“Mr. J. H. Lewis,
Richmond, Va.,

“Dear Sir:

“We are informed that you have been going around Richmond to all our customers, stating that you are suing us for \$10,000.00. If you wish to sue us it is your pleasure, but we will say now, once for all, that the bill of goods which we shipped you is now in our warehouse in Baltimore, and when the bill is due we shall expect payment of the same. If same is not paid we will enter suit against J. H. Lewis. We cannot sue now as this bill is not due. We have the affidavits of those customers of ours regarding the statement which you have made. We have our rights and we are going to stand by same, and when we write you we write facts, and what we state we mean. If you wish goods shipped to you they are in our warehouse here, and you can have same

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recalled. The attorney who will have charge of this case will be S. S. P. Patteson. If you are looking for trouble you will certainly get it.

“Respectfully yours,

(Signed) “Henry Myers & Co.,

“L. J.”

This letter also was written by Jandorf. It practically ratified and reiterated what was said in the letter of August 11, 1913.

Upon the question of whether punitive or exemplary damages are recoverable in this case against the partnership, it becomes important to ascertain what the facts were with reference to the knowledge and approval on the part of the partner Greenbaum of the letter of September 4th.

The evidence on this question of fact is conflicting.

There is the positive statement of Jandorf, that Greenbaum had not returned to Baltimore when the letter of September 4th was written. There is also testimony to the effect that Greenbaum was absent from Baltimore and the place of business of the partnership, from August 8th or 9th, until “the first week in September,” and then on his return he heard of the threatened suit of the plaintiff and “during the first week in September,” when “he had just returned,” he read over the correspondence aforesaid on file in the office of the partnership, and there saw the letter of August 11, 1913, and expressed his disapproval of it, stating to his stenographer, in the presence of Jandorf, “that if he had been in the city when the letter was written he would not have permitted it to have been written.” But while Greenbaum testified in the case, he does not say he did not know of the contents of the subsequent letter of September 4th. (Greenbaum does testify that when not absent from the city, he was, by express partnership agreement, in actual charge of all correspondence.) Jandorf himself testified that after his partner Green-

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baum saw the correspondence prior to September 4th and expressed his disapproval of the letter of August 11th, the latter left it to Jandorf to conclude the correspondence with the plaintiff, which was done by the letter of September 4th. Besides Jandorf testified positively, and Greenbaum does not deny, that Greenbaum and himself decided on employing Mr. Patteson to defend the suit of plaintiff—that this was done after Greenbaum had been informed of the threatened suit, which was not until after Greenbaum returned to Baltimore as afore-said. Now the letter of September 4th bears indisputable internal evidence that the employment of Mr. Patteson had been “decided on” before that letter was written. There was evidence before the jury, therefore, which would have warranted them in concluding that Greenbaum knew and approved of the letter of September 4, 1913, and hence, although he expressed disapproval of the letter of August 15, 1913, did in fact afterwards ratify and approve of the position taken therein. In the letter of September 4th, it is said, “We have our rights, and we are going to stand by same, and when we write you we write you facts and what we state we mean.”

There were two preliminary questions raised in the progress of the case in the court below, which are presented to us for decision by the assignment of error, namely:

Whether the return of personal service of the process commencing the action was under oath, as required by section 3232 of the Code of Virginia?

Whether, on motion of defendants to quash the attachment on the ground that “One partner cannot bind another by his tortious acts,” and depositions were tendered by defendants proving, as they alleged, that there was no authorization or ratification of the tort by the other partner, the court below should have acted on and sustained such motion on such ground before the case was matured for hearing on its merits.

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On the first question, the facts were as follows:

There was the following return on the said process:

"Executed by delivering a true copy of the written summons to Louis Jandorf and Sydney Greenbaum, non-residents of the State of Virginia, in person, on the 19th day of September, 1913, at 9:40 o'clock A. M., in the city of Baltimore.

"Given under my hand this 19th day of September, 1913.

(Signed) "Charles Klinejohn."

To this return is attached an affidavit of a notary to the effect that Charles Klinejohn appeared before him in person and "made oath that the statements made in the foregoing return are true."

The trial court decided both of these questions adversely to the defendants.

There was a trial by jury in the court below; a verdict and judgment for the plaintiff, Lewis, for the amount of \$750.00.

The remaining assignments of error involve the action of the trial court in

Giving and refusing instructions;

Admitting certain testimony over the objection of the defendants; and

Refusing to set aside the verdict of the jury and grant the defendants a new trial.

THE INSTRUCTIONS GIVEN AND REFUSED.

The instructions asked for by the plaintiff were given as asked, over the objection of the defendants, and were as follows:

Instruction No. 1.—"The court instructs the jury that the members of a partnership are liable for the wrongful acts of a partner while he is acting in the ordinary course of the

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firm's business, and if you believe from the evidence that the letter complained of in the declaration, was written by one of the partners while the other partner was out of the city, and that all correspondence in reference to the business of the partnership was left in the hands of the writer of the letter, and that the said letter was written within the scope of the authority of the partner writing the letter, then you must find for the plaintiff against the defendants, if you believe from the evidence that the words used in said letter were from their usual construction and common acceptance construed as insulting and tending to violence and breach of the peace."

Instruction No. 2.—"The court instructs the jury that though you may believe from the evidence that the letter referred to in the declaration has done the plaintiff no permanent injury, yet, if you believe from the evidence that the letter was written with actual malice, and that the defendants are liable, then you may award damages not only for any temporary injury, but also as exemplary damages to deter the defendants and other parties from a repetition of the offense. *Tyree v. Harrison*, 100 Va. 542, 42 S. E. 295."

The instructions asked for by the defendant were as follows:

Instruction No. 1.—"The court instructs the jury that if they believe from the evidence that the letter sued on was the personal act of Mr. Jandorf, and outside of the scope of the partnership business, and written by him because he felt angered and aggrieved at what he conceived to be the bad treatment of the partnership by the plaintiff, they must find for the defendants."

Instruction No. 2.—"The court instructs the jury that if they believe from the evidence that the alleged libelous letter was written by Louis Jandorf during the absence of Sydney Greenbaum and without his knowledge or consent, and that Sydney Greenbaum did not subsequently ratify

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the act of Louis Jandorf in writing this letter and that the firm of Henry Myers & Company did not receive a benefit by the writing of the letter, then they must find for the defendant."

Instruction No. 3.—"The court instructs the jury that a partnership is not liable for the wrongful act of one of the partners unless the other partner participates in the act, or authorizes the doing of the act, or ratified it after it was done, or received some benefit from it, or unless the act was within the usual and ordinary scope of the partnership business."

Instruction No. 4.—"The court instructs the jury that a recovery against the partnership will be limited to the actual injuries suffered by the plaintiff, and that the punitive or exemplary damages may not be assessed against the partnership for the wrongful act of one of the partners."

Instruction No. 5.—"The court instructs the jury that should they find for the plaintiff, they may assess against the defendants such damages as they think proper under all the circumstances of the case. That in assessing damages, they may take into consideration motive and intent of the defendants, the extent of publication and may determine in view of all the evidence whether punitive damages should be allowed."

Instruction No. 6.—"The court instructs the jury that punitive damages may be awarded only in case the publication was made with actual malice on the part of the defendants for the plaintiff, and that the presence or absence of actual malice is to be determined by the jury taking into consideration all of the evidence in the case."

The court refused to give instructions Nos. 1 and 4 asked for by defendants; gave, as asked, such instructions Nos. 3, 5 and 6: modified such instruction No. 2 by adding the words, "and not within the scope of his authority," so that such instruction as given read as follows:

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"The court instructs the jury that if they believe from the evidence that the alleged libelous letter was written by Louis Jandorf during the absence of Sydney Greenbaum and without his knowledge or consent *and not within the scope of his authority*, and that Sydney Greenbaum did not subsequently ratify the act of Louis Jandorf in writing this letter, and that the firm of Henry Myers & Company did not receive a benefit by the writing of the letter, then they must find for the defendant." (Italics supplied.)

THE ADMITTED TESTIMONY, OBJECTED TO.

This testimony, the objection and ground of it and the ruling of the court thereon will most succinctly appear from defendants' bill of exceptions to No. 5, which, so far as material is as follows:

Bill of Exceptions, No. 5.—"* * * during the examination of the plaintiff, J. H. Lewis, as a witness on his own behalf, counsel for defendant, with the purpose of ascertaining generally the nature of the damages, if any, suffered by the plaintiff, asked the following question on cross-examination:

"Q. Can you state in what way you have been injured by the letter you received from Henry Myers & Company?"

"To which question the witness replied:

"A. Well, gentlemen, I don't know direct, but indirect, I have been injured a great deal. For instance, I have been buying goods from North Brothers and Strause. I have bought from them, as much as four or five hundred dollars worth at a time, and I received the goods and everything was O. K."

"To which answer of the witness, the defendant, by counsel objected, stating that plaintiff could not give testimony as to special damages as no special damages were alleged in the declaration, and the court overruled the objection of the defendants, and allowed the evidence to go to

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the jury, it being of the opinion this could not be considered as evidence of special damages, but could be considered as a part of the plaintiff's case which he had a right to prove under his declaration, and allowed the witness to continue his answer as follows:

"Their salesman came along and I bought some goods from them, and then in three or four or five days, I got a letter saying 'Mr. Lewis, we have received your order and are very sorry to say that we cannot now ship the goods. We will be glad to sell you goods provided you send us check for the same.'

"To which action of the court in overruling defendants' objection to the testimony offered, and allowing witness to give the aforesaid evidence, the defendants by counsel, excepted, etc."

S. S. P. Patteson and Duval & Duval, for the plaintiffs in error.

L. O. Wendenburg, for the defendant in error.

SIMS, J., after making the foregoing statement delivered the opinion of the court.

With regard to the two preliminary questions above referred to, we deem it sufficient to say:

With reference to whether the return on the process above quoted was "under oath" as required by section 3232 of the Code of Virginia:

We think the trial court correctly ruled that such return was under oath as required by the statute referred to, the affidavit accompanying the return evidencing that fact.

With reference to whether, on motion of defendants to quash the attachment on the ground that "one partner cannot bind another by his tortious acts," accompanied by tender of depositions which the defendants claimed showed

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that there was no authorization or ratification of the tort by the other partner the court below should have acted on and sustained such motion on such ground before the case was matured for hearing on its merits:

We think the trial court was also correct in its ruling on this question. The question of the validity of the debt or demand of the plaintiff, *i. e.*, whether it was or was not "established did not arise upon a preliminary motion to quash the attachment but only when the case was heard upon its merits." Section 2981, Code of Virginia. Therefore the court below properly ruled that "the questions of liability of the partnership for the torts of one of the partners is not within the scope of the motion to quash the attachment, but would have to be determined when the case came up for trial on its merits," and hence properly overruled the motion aforesaid.

Coming now to the consideration of the action of the trial court involved in the remaining assignments of error.

It seems that the instant case is one of first impression in this court on the subject of the liability of a partnership for a libel published by one of the partners.

We will take up and pass upon the subjects involved in the assignments of error in their order as stated below.

Giving and refusing instructions.

1. The court below committed no error in giving instructions No. 1 asked for by the plaintiff. It correctly propounded the law as it has been well settled in principle since as early as the time when Lord Holt was Chief Justice of England. *Hern v. Nichols*, 1 Salk. 289. The latter was a case of agency; but the liability of a partnership for the acts of an individual partner, *in delicto*, as it has been well settled also from the earliest times, rests on the doctrine of agency. Story on Part. (5th Ed.) Sec. 166; *Linton v. Hurley*, 14 Gray (Mass.) 191; *Locke v. Stearns*, 1 Met. (Mass.) 560, 35 Am. Dec. 382; *Lothrop v. Adams*, 133 Mass., 471, 43 Am. Rep. 528. Indeed the liability of a partnership in

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such case rests precisely upon the same principle as the liability of a corporation for the torts of its agents or employees, whether of malfeasance or non-feasance, *Mackey v. Commercial Bank*, L. R. 5 P. C. 394, a case of fraud by employee of a corporation; *Swift v. Winterbotham*, L. R. 8 Q. B. 244, a case of fraud by employee of a corporation; *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138, where the tort of the individual partner consisted of negligence; *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 3 So. 800, a partnership case; *Read v. Home Savings Bank*, 130 Mass., 443, 39 Am. Rep. 468, a corporation case; and many other authorities on this subject too numerous to cite. The doctrine in the law of negligence of the liability of the master for the negligence of his servants, as well as the doctrine of the liability of the master for the malfeasance—the active torts—of his servants, and the great bodies of law which have been built upon these subjects, rest alike upon the same foundation—the doctrine of agency.

The most difficulty in holding a master or principal liable for a tort by his servant, or agent, where a specific actual intention or purpose is necessary for its commission (the tort being neither expressly authorized before its commission nor ratified afterwards by the former), was experienced by the courts in the case of corporations, where it was first doubted whether there could be present, in such an act by an agent or servant, the personality necessary to actually will and to do,—to commit an active tort; and too, the *ultra vires* doctrine in such case gave difficulty. *Maynard v. F. F. Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672, and *Id.*, 47 Cal. 207, a case where a corporation was held liable for a libel published by an employee. But as was said in *Read v. Home Savings Bank*, *supra*, “for a quarter of a century corporations have been held liable in tort actions, both for non-feasance and malfeasance.” To the same effect see *Railroad Co. v. Quigley*, 21 How. 202, 16 L. Ed. 75 (a case of an action against a railroad company for libel, where it is

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said "for acts done by the agents of a corporation, either in *contractu* or *in delicto*, in course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances;") also *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, where a corporation was held liable in an action against it for libel; and *Sun Life Ins. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692, holding a corporation liable in such an action.

The difficulty, as has been often remarked, lies not in the uncertainty of the principle we are considering, but in its application. This difficulty, and as we think, the key to its solution in the instant case, will be disclosed by the illustrations afforded by the quotations we make below from some of the leading cases on this subject.

In *Barwick v. English Joint Stock Co.*, L. R. 2 Exch. 259, (which was an action *in delicto* against a corporation for the fraudulent concealment and misrepresentation of one of its servants), Willis J. in delivering the opinion of the court said:

"With respect to the question, whether a principal is answerable for the act of his agent *in the course of his master's business*, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed *in the course of his service* and for the master's benefit, though no express command or privity of the master be proved. (See *Laugher v. Pointer*, 53 &c. 547, 554, 11 E. C. L. R. —.) That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding owners of ships liable for the acts of masters abroad, improperly selling the cargo. (*Ewbank v. Nutting*, 7 C. B. 797, 62 E. C. L. R. —.) It has been held applicable to actions of false imprisonment, in cases where officers of railway companies

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intending to act in the course of their duty, improperly imprison persons" (citing a number of English cases). "It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. (*Huzzy v. Field*, 2 C. M. & R. 432, 440). In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." (Italics supplied.)

In *Mackay v. Commercial Bank*, L. R. 5 P. C. 394, (which was an action for deceit for false and fraudulent representation contained in a telegram sent by the cashier of the defendant bank). The cashier "kept the books, conducted the correspondence and prepared the telegrams of the bank." It is said in the opinion in that case:

"* * * It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed, it may be assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agents' authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and it would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds where it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds; at the same time, it is not easy to define with precision the extent to which this liability has been carried.

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The best definition yet, in their Lordship's judgment, is to be found in the case of *Barwick v. English Joint Stock Bank*" (which is quoted above) "where the judgment of the Exchequer Chamber was delivered by one of the most learned judges who ever sat in Westminster Hall." (Italics supplied.)

After quoting from the case last named, the opinion in *Mackay v. Commercial Bank*, *supra*, continues:

"This doctrine was acted upon lately by the court of Queen's Bench, in *Swift v. Winterbotham*, Law Rep. 8 Q. B. 244 where they held a banking company liable in respect of a fraudulent guarantee by their manager * * * although the bank derived no benefit from the representation. This judgment was, indeed, reversed in the Exchequer Chamber on the ground that the signature of the manager was not the signature of the company within the words of 9 Geo. 4, C. 14, S. 6, and that the representation was made by the manager only in his individual capacity, but Lord Coleridge, in delivering the judgment, observes, 'This does not at all conflict with the case of *Barwick v. English Joint Stock Bank*, * * * and cases of that description, because there can be no doubt that where an agent of a corporation, or joint stock company, *in conducting its business*, does something of which the joint stock company take advantage, or by which they profit, or *by which they may profit*, and it turns out that the *act* which is done by their agent is a fraudulent *act*, justice points out, and authority supports justice in maintaining that they cannot afterwards repudiate the agency, and say that the *act which has been done* by the agent is not an act for which they are liable.'" (Italics supplied).

In *Dunn v. Hall*, 1 Ind. 344 (where Watts and Dunn were the owners of a newspaper plant) Dunn, the part owner and publisher of the newspaper was held liable for a libel published in his newspaper, although he, before the publication, expressly forbade the agent left in charge of the publication of the paper from publishing the libel, and Watts,

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before such publication, expressed disapprobation of it. The court in their opinion in this case said: “* * *if Dunn, the owner and publisher of the paper, chose to leave his home and place his paper in charge of another person, he is responsible *for the conduct* of the person he so employed: the person so engaged is the owner’s agent in *that business* and he must be chargeable no matter what private instructions he may have given him; so, if Watts is a joint owner of the concern and chooses to permit Dunn to edit it, or any other person, he too, is responsible for the conduct of Dunn or such other person so employed. We do not think that the publication having been made against the express disapprobation of Watts, is, of itself, sufficient to discharge him, if, by the exercise of due and proper diligence he could have prevented the publication. If he chose not to oversee the publication of his paper, but to trust it to others, he must be held responsible to the public for the conduct of those he employs, even if his agent does make a publication which he had forbid.” (*Italics supplied*).

The court then refers to the line of cases and authorities on the subject of the liability of owners of newspapers for libels printed therein “*in the ordinary course of their business*” without the actual knowledge or approval or possibility of it, on the part of the owners, on account of their absence, etc. See also Bac. Ab. Lit. Libel 458; 2 Stark on Slander, 29 notes, Wend. Ed., as to liability of book-sellers for libel when a book or pamphlet containing a libel is sold by them *in the usual course of trade*, in ignorance of its contents; *Rex v. Gutch*, 1 M. & M. 433, where the owner of the newspaper who lived more than a hundred miles from the place of business of the newspaper, was held criminally liable for the printing therein of a libel, in which Lord Tenterdon, Chief Justice, in delivering the opinion of the court said: “the owner * * * who derives profit from the concern,” (not necessarily from the publication of the particular libel) “and who furnishes the means to carry on the concern and who entrusts the conduct of the publication” (of

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the newspaper) "to one whom he selects and in whom he confides, ought to be answerable, even criminally, although it cannot be shown that he was individually concerned in the *particular publication*. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication and without whom it could not be published, might remain behind and escape altogether. (Italics supplied.) To the same effect *Rex v. Walter*, 3 Esp. 21, *Com'th v. Morgan*, 107 Mass. 109, prosecution for libel; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170, action of slander; *Storey v. Wallace*, 60 Ill. 51, action for libel.

In *Wolf v. Mills*, 56 Ill. 360 (which was an action for deceit) a partnership was held liable for the fraudulent conduct of one of the partners, without the participation or knowledge of the other partner in the fraud. The tort was committed in the sale of a lot of sheep skins "*in the course of the partnership business*." (Italics supplied).

In *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550 (which was an action for deceit), a real estate partnership was held liable for the fraud of one of the partners (the other partners having "no connection with, knowledge of or participation in the fraud"). The fraud was committed in a sale of land, it being "*in the transaction and prosecution of a partnership enterprise*." (Italics supplied.)

In *Linton v. Hurley*, 14 Gray (Mass.) 191 (which was an action for personal injury occasioned by the negligence of one of the partners, or of servants employed by the firm in the unloading of the vessel which the firm had contracted to unload), the partnership was held liable, although one of the partners was absent when the accident occurred and had no knowledge of and did not participate in the negligent manner of doing the work. (These facts and the resultant holding of the court, so familiar in negligence cases, are cited here merely to illustrate what guidance may be

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obtained from the rule on the same subject in the law of negligence.) Bigelow, J., in delivering the opinion of the court, said:

"The injury was occasioned either by the negligence of servants employed by both defendants, or by one of them, while acting *within the scope of the firm*. Partners, like individuals, are responsible for the negligence of their servants while *engaged in the business incident to their employment*; and if one partner acts, he is considered as the servant of the rest of the firm. *Moreton v. Hardern*, 4 B. & C. 223, 6 D. & R. 275; Collyer on Part., sec. 457 *et seq.*; Story on Part., 166." (Italics supplied.)

In *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 3 So. 800, it does not appear what the business of the defendant partnership was nor what was the tortious act of the partner at fault. But the court held and in its opinion said: "We entertain no doubt of the fact that there may be cases where a partnership is liable for the publication of a libel, as for other like tort, including constructive or legal malice. Of course, generally when the tort complained of is the act merely of one partner * * * in order then to render the other partners liable, the wrong complained of must be committed by such partner *in his character as partner and in the course of the partnership business*." (Italics supplied.)

In *Locke v. Stearne*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382, which was an action for deceit consisting in the fraudulent sale by one of the partners, or by an employee, of a mercantile partnership, of meal as linseed meal, when it was in fact a mixture of linseed and tealseed meal, without the knowledge of the other partners, Chief Justice Shaw, in delivering the opinion of the court holding the partnership liable, said: "The deceit was done for the defendants' benefit, by their agent acting under their orders *in the conduct of their general business and responsible to them*; and when one party must suffer by the wrong and misconduct

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of another, it is more reasonable that he should sustain the loss who reposes the confidence in the agent than he who has given no such confidence. *Hern v. Nichols*, 1 Salk. 289. * * * it is laid down in the general rule of the common law that the principal is civilly responsible for the acts of his agent. *Doe v. Martin*, 4 T. R. 66. * * * The rule proceeds upon the ground that the servant is proceeding within the scope of his authority, actual or constructive. The case of a sheriff who is liable *civiliter*, even in an action of trespass, for the misconduct of his deputy, is another familiar application of the rule. *Grinnell v. Phillips*, 1 Mass. 530. The rule is laid down generally in a recent compilation of good authority, that though a principal, in general, is not liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit or other wrongful act of his agent *in the course of his employment*, though in fact the principal did not authorize the *practice* of such acts; but the wrongful or unlawful act must be committed *in the course of the agent's employment*. 3 Chit. Law of Com. & Man., 200, 210.

"As to the other point, which is indeed little more than a further application of the same principle, it is laid down, as the general rule, that one partner is liable *civiliter* for damages sustained by the deceit or other fraudulent act of his co-partner done *within the scope of the general partnership authority*. Collyer on Partnership, 241; *Rapp v. Latham*, 2 Barn. & Ald. 795; *Willet v. Chambers*, Cowp. 814." (Italics supplied.)

Other expressions of the rule on this subject found in the text books and decisions which may be helpful are as follows: "The firm is liable for the wrongful acts or omissions of a partner while he is acting *in the ordinary course of the firm's business*" (30 Cyc. 523); "in the course of and for the purpose of *transacting the firm's business*" (*Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886); "in the *usual and ordinary prosecution of the firm's busi-*

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ness'" (*Shapard v. Hynes*, 104 Fed. 349, 45 C. C. A. 271, 52 L. R. A. 675); "within the *proper scope and business of the partnership*" (Story, Part. 168); "a wilful tort committed by a partner *in the course and for the purpose of transacting the business of the firm*, may make the firm responsible." (Lindley on Part. 150, citing Pollock on Torts, 80.) (Italics supplied.)

The authorities on the subject develop the conclusion that where there is neither express authority in advance nor ratification afterwards, the test of the liability of the master or principal for the tortious act of the servant or agent, is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a non-tortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the *tortious manner* in which a transaction is conducted or a service is performed, entrusted by the former to the latter to be conducted or performed for him in a non-tortious manner. The same is true, of course, as we have above seen, with respect to the liability of a partnership for a tort of an individual partner.

There can be no doubt but that much of the confusion in the authorities and difficulty experienced by the courts in the application of the general principle of the law above considered has been occasioned by the ambiguity of the word "authority," it being capable, in its narrowest sense, of a meaning having reference to the tortious act itself—which, as we have seen, is not its true meaning as sustained by the authorities, when it is used in connection with the

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subject we have under consideration. This in turn has sometimes occasioned the losing sight of the true test of the liability in question above adverted to.

Another fallacy, which has found some lodgment in some of the decisions and has been retained in the text of many of the text-writers on the subject, is that whether the master or principal has in fact received a benefit from the tortious act is a test of the liability of the latter for compensatory damages. It is true that if the benefit in such case is knowingly received by the master or principal, it is a circumstance material to be considered in some cases on the point of the liability of the latter (see *Harvey Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073, relied on by counsel for defendant); but it is material as evidence tending to show ratification, not as a test of original liability.

The reference in other cases to the benefit of the tortious act can be justified in principle only on the ground that this fact is a circumstance tending in part to show ratification. *Castle v. Bullard*, 23 How. 172, 16 L. Ed. 424.

But the mere receipt of a benefit is not a ratification of the tortious act from which the benefit was derived, since "ratification never takes place without knowledge." Bates on Partnership, sec. 478. Moreover, ratification of a tortious act does not always result in liability therefor. "He that agreeth to a trespass after it is done is no trespasser, unless the trespass be done for his use or benefit, and thus his agreement subsequent amounteth to a commandment." 4 Coke Inst. 317. See to same effect, *Wilson v. Tumman*, 6 M. & G. 236; Year Book H. 7, H. 4, fo. 34, pl. 1. The true question is, was the tortious act committed by the servant or agent in the course of his service or employment? Mere ratification then, is not itself a test of liability of one for the tortious act of another, much less is the receipt of a benefit from the tortious act such test, which in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification is material

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as bearing upon the measure of damages, as we shall see below; but is not a true test of original liability in cases such as these we are considering. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment? Was the service in which the tortious act was done incident to the employment? Which resolves itself into the same questions in another form—Was the person guilty of the tortious act engaged at the time of its commission in the discharge of the duties of a servant or agent of the master or principal sought to be held liable in damages therefor? Did the relationship of master and servant or principal and agent exist *quoad* the service in which the tortious act was done? (See opinion of this court in *Atlantic Coast Line Railroad Co. v. Tredway's Admr.*, 93 S. E. 560, 120 Va. 735, handed down at this term of court, on the subject of when this relationship exists in negligence cases.) If the act in question falls within this definition, the master or principal is liable in damages, regardless of whether the act was in fact beneficial to the latter or the contrary. *White v. Sawyer*, 16 Gray (Mass.) 586, a case of partnership; *Aldrich v. Press Printing Co.*, 9 Minn. 133 (Gil. 123), 86 Am. Dec. 84, case of a corporation. As the learned author of *Bates on Partnership*, section 478, correctly says, on the subject of receipt of benefit being a ground of liability *ex delicto*: “ * * * this ground is not the true one.” If it were, the more wanton the act, although done by the servant or agent in the course of his employment, the less likelihood there would be any liability on the part of his master or principal. The authorities negative this consideration as a ground for the exoneration of the master or principal from liability for the tortious acts of their servants or agents.

To conclude the consideration of the subject of benefit received as a ground of liability of one for the tortious act of another: In cases where the action is in *assumpsit*, to recover of the master, or principal, money of the plaintiff

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acquired by the former through the tortious act of his servant or agent, the true issue, indeed, is, was the benefit of the tortious act in fact received by the master or principal (as in *Durant v. Rogers*, 87 Ill. 508, also *Idem*. 71 Ill. 122; and in *Guillon v. Peterson*, 89 Pa. 163). In such cases, however, "the innocent partners are not liable *ex delicto*, but the firm is chargeable for money had and received." Bates on Partnership, sec. 478, p. 498.

Tested by the above conclusions, the tortious act complained of in the instant case, being done by one partner in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a non-tortious manner, the service itself—the writing of the libelous letter to plaintiff with the purpose of obtaining from him the payment of the alleged debt due the partnership—was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence.

The instant case presents no difficulty on the question of whether the tortious act was committed in the ordinary course of the business of the principal—*i. e.*, in the discharge of the duties of a servant or agent of the master or principal; *i. e.*, in a service incident to the employment—in short, whether the relationship of master and servant, or of principal and agent, existed *quoad* the business in the performance of which the tortious act was committed. There are cases, however, where the border line between what should be considered the business of the master—what is embraced within "the ordinary course of business" of the master or principal—becomes very indistinct and difficult of ascertainment. Manifestly there may be cases where the individual action of the general agent or servant is so out of the ordinary course of the business of his principal or master that it is evident he acted individually,

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outside of the relationship of principal and agent, or of master and servant, that the act was not done in the name of the principal or master or for his use; and in such cases the act is regarded as that of the individual and not that of the principal or master. On such ground the decisions rest in the cases of *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Petrie v. Lamont*, 1 Car. & March, 57; *Grund v. Van Vleck*, 69 Ill. 479; *Titcomb, &c. v. James*, 57 Ill. App. 296; *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387—cited and relied on by counsel for defendants. In principle, in such cases, the ratification of the tortious act by the master, or principal, would not have rendered the latter liable therefor. 4 Coke Inst. 317; *Grund v. Van Vleck*, *supra*; *Wilson v. Tumman*, *supra*; *Year Book*, 7 H., *supra*. The decisions of cases, on the one side or the other of the border line adverted to, are not all in accord; or reconcilable, indeed, on principle (see collation of some of such character of cases in *Bates on Partnership*, secs. 465, 466); but, as above stated, the principle involved is not left in doubt by the authorities and the application of it is without difficulty in the instant case.

Hence, as above stated, the court below committed no error in giving instruction No. 1 asked for by the plaintiff.

2. The court below correctly refused to give instruction No. 1, asked for by the defendants, because there was no evidence to support it, and it was contrary to all the evidence on the subject. The evidence for defendants themselves on this point was all to the effect that the tortious act of Jandorff was "within the scope of the partnership business," as we have above seen.

3. The court below committed no error in refusing to give instruction No. 4, asked for by the defendants.

As stated by 8 R. C. L., sec. 142: "There is some conflict in the authorities as to when and how far a principal or master is liable for exemplary or punitive damages for the torts of his agent or servant. Some courts hold that the

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principal or master is never liable for exemplary damages under such circumstances, while others hold that he is liable where he has authorized or ratified the act of the agent or servant, but not otherwise. Still another line of authorities is to the effect that the principal or master is liable for such damages regardless of whether or not he has authorized or ratified the act of his servant or agent."

The rule on this subject in Virginia has been firmly established, and is that the principal or master is liable when he has previously authorized or subsequently ratified the tortious act of the agent or servant. *N. & W. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809; 20 L. R. A. 817; *Southern Ry. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749. And the rule seems to be supported by the great weight of authority.

Regarding the evidence in the instant case, as we must regard it, the jury may have found, and hence we must find, as appears from the statement of facts above, that the innocent defendant partner subsequently ratified the tortious act of the other defendant partner. Hence, the trial court correctly refused to give the instruction under consideration.

4. There was error in the action of the court below in giving instruction No. 2, as asked for by the plaintiff, but we must regard this as harmless error in the instant case.

As an abstract proposition, it was error to instruct the jury that, if they found the defendant liable for damages, they might award exemplary damages. As we have above noted, the rule in this State is that the principal or master is liable for compensatory damages only for the tortious act of his agent or servant, unless he previously authorized or subsequently ratified the tortious act. In the instant case, however, as we have also noted above, we must regard the tortious act in question as having been subsequently ratified by the innocent defendant partner, and hence it is evident that had the instruction under consideration contained the correct limitation, to the effect that the jury could not award exemplary damages against the firm

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unless they believed from the evidence that the tortious act of Jandorf was subsequently ratified by the other defendant partner, the same verdict might have been rendered. Hence, it does not affirmatively appear that the error in question was injurious, and under the rule established in *Standard Paint Co. v. Vietor*, 91 S. E. 752, 120 Va. 595, we must regard the error as harmless. Moreover, the error of the trial court in this particular was invited by instruction No. 5 asked for by defendant and given by the court, which was erroneous for lack of the same limitation above referred to. The case was tried in the court below on this point, as asked for by both parties, defendants as well as plaintiff, to the effect that the jury should go without any express limitation in the instructions such as we have under consideration; and it is now too late for the defendants to avail themselves in an appellate court of such omission.

We come now to the consideration of the action of the trial court in—

Admitting certain testimony over the objection of the defendants.

This testimony appears from Bill of Exception No. 5, copied in the "Statement of the Case and Facts" given above.

The libel alleged in both counts of the declaration in the instant case was actionable *per se*. The plaintiff, therefore, was entitled to recover substantial, and even punitive damages, without any proof of particular instances of special damage. This is because the law presumes general damages where the libel is actionable *per se*. Newell on L. & S., p. 1043, sec. 1018, p. 1047, secs. 1020, 1024. The plaintiff accordingly introduced no proof whatever of any special damage. It was by the defendants that the testimony objected to was elicited by their question on cross-examination. If the defendants were not content to let the case stand upon the general damages presumed by law in such a case, but wished to attempt to rebut this presumption by

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asking the question as to what actual injury the plaintiff had in fact sustained by the libel, they had the right to do this, in diminution of damages. Having asked the question, they cannot sustain their objection to the answer, which was in direct response to the question as far as it went.

We have now only to dispose of the remaining question, whether there was error in the action of the court below in—

Refusing to set aside the verdict of the jury and grant the defendants a new trial.

The same reasons are urged upon this point by counsel for defendants as those considered above in connection with the assignments of error with respect to the other actions of the trial court excepted to. Hence, what has been above said disposes also of this question adversely to the defendants.

For the foregoing reasons, we find no error in the action of the trial court or in the judgment complained of, and such judgment will be affirmed.

said disposes also of this question adversely to the defendants. For the foregoing reasons, we find no error in the action of the trial court or in the judgment complained of, and such judgment will be affirmed.

Affirmed.

Syllabus.

Hytheville.

JENNINGS V. MARSTON.

June 14, 1917.

Absent, Burks, J.*

1. **EJECTMENT—Common Source of Title—Common Grantor.**—Conveyances from the same grantor of separate tracts of land, although they may be adjoining tracts, do not necessarily constitute, in contemplation of law, a common source of title. The terms, "common grantor" and "common source of title," are not always synonymous and interchangeable, although in most cases the facts are such that the two terms do mean the same thing.
2. **EJECTMENT—Common Source of Title—Common Grantor—Estoppel.**—The rule that a plaintiff in ejectment need not trace title back of the common source rests upon the principle of estoppel, the defendant not being allowed the inconsistency of claiming both under and against the same title. But the inconsistency must be actual and substantial; and when it affirmatively appears that the real dispute is as to the location of a boundary line between two distinct tracts, one of which the common grantor derived from one source and conveyed to the plaintiff, and the other of which he derived from another source and conveyed to the defendant, there is no inconsistency and, therefore, no estoppel to prevent the defendant from denying that the plaintiff's grantor has title to the land in dispute.
3. **ESTOPPEL—Deed—Warranty of Title—Mortgages and Deeds of Trust.**—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to

*Case submitted before Judge Burks took his seat.

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the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which calls for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the "Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity."

4. **EJECTMENT—*Plaintiff's Title.***—In an action of ejectment the plaintiff must recover upon the strength of his own title, which he must connect with the Commonwealth, or with a common source with that of the defendant. There are exceptions to the rule, but the case at bar does not fall within any of them. The defendant, for example, was not a mere trespasser or intruder but held a deed for the land under which he was exercising the acts of ownership and possession resulting in this suit.
5. **BOUNDARIES—*Waters and Watercourses.***—Riparian owners (on non-navigable streams) are presumed to own to the middle thread of the stream; and when they do own to the middle and convey by a deed calling for the stream as a boundary, they are conclusively presumed in law to convey to the middle, unless they expressly exclude that presumption by words in the conveyance. The presumption of ownership to the middle of the stream, however, is a rebuttable presumption, and yields to proof that the edge of the stream is the true boundary line. When this latter fact affirmatively appears, there can be no presumption that a deed calling for the stream was intended as a conveyance to the middle. A grantor is not presumed to intend to convey more than he owns.

Error to a judgment of the Circuit Court of the city of Williamsburg and county of James City, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

S. O. Bland and Henley, Hall & Hall, for the plaintiff in error.

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Frank T. Armistead and B. D. Peachy, Jr., for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is an action of ejectment brought by Ann E. Marston against A. W. Jennings. We will hereinafter designate these parties, respectively, as plaintiff and defendant, in accordance with their positions in the circuit court. There was a judgment below for the plaintiff upon a demurrer which she interposed to the evidence, and thereupon the defendant brought the case here upon a writ of error.

No effort was made by the plaintiff to trace title to the Commonwealth, and the first question presented for our decision is whether the title under which she claims is shown to have been derived, as she contends, from a source common with that of the defendant.

The tract of land described in the declaration is known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, is the "Cranston Mill-pond." This pond or dam has been down for a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." (The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which call for the pond as a boundary carry her title to the center of the stream.)

The plaintiff's documentary title, so far as shown, is as follows: (1) Deed of trust (to secure a debt), dated January 20, 1886, from A. H. and Charles Cranston (alleged common grantors) to E. B. Ratcliff, trustee; (2) Deed, dated October 6, 1890, (consummating a foreclosure and sale under the trust deed), from H. B. Ratcliff, trus-

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tee, to D. W. Marston; (3) Deed, dated June 1, 1914, from the heirs at law of D. W. Marston, deceased, to Ann E. Marston, the plaintiff. Each of these deeds convey the "Badkins Tract," and, as stated, describe it as bounded on the south by the mill-pond.

Having traced her own title as above, the plaintiff then introduced two deeds in the defendant's chain of title which, with their recitals and certain oral and undisputed evidence, show that the defendant's title was derived from Charles Cranston in his own right and as the survivor of his brother, A. H. Cranston. These two deeds, so far as they are material in this connection, were as follows: (1) Deed, dated January 15, 1913, from Charles Cranston and wife to the Cambridge Manufacturing Company for "a certain water grist-mill formerly known and called Bush's mill * * * and the mill-pond which, by estimation, is ninety acres of land, be the same more or less, covered with water, and about thirty-five acres of land, be the same more or less, being a portion of the hundred acres belonging to said mill property." The deed contains no further description of the ninety-acre tract, but describes the thirty-five acres by metes and bounds; (2) Deed, dated April 28, 1914, from Cambridge Manufacturing Company to A. W. Jennings, the defendant in this case. This deed conveyed the ninety acres and the thirty-five acres by substantially the same description as above; and each of the two deeds warranted the title generally as to the latter, and specially as to the former tract. It is under the conveyance of the ninety acres that the defendant claims title to the land in controversy.

It will thus be seen that the title of the plaintiff and defendant, respectively, is each derived from the same grantors, Charles and A. H. Cranston; but at this point the question arises, whether conveyances from the same grantor of separate tracts of land, although they be adjoining tracts, necessarily constitute, in contemplation of

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law, a common source of title. It is contended by the plaintiff that the terms, "common grantor" and "common source of title," are synonymous and may always be used interchangeably. We do not think this can be maintained as a proposition universally and necessarily true. In most cases the facts are such that the two terms do mean the same thing, and it is possibly for this reason that the question arising in this case is an open one in Virginia as well as elsewhere generally. The question was raised in *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742, but was not decided because the defendant had asked for an instruction which practically admitted that the common grantor was, in fact, the owner of the identical right or title under which both he and the plaintiff claimed. Looking to the reason of the rule that a plaintiff in ejectment need not trace title back of the common source, there is no difficulty in settling the question under discussion. The rule rests upon the principle of estoppel, the defendant not being allowed the inconsistency of claiming both under and against the same title. But the inconsistency must be actual and substantial; and when it affirmatively appears, as we shall see it does in this case, that the real dispute is as to the location of a boundary line between two distinct tracts, one of which the common grantor derived from one source and conveyed to the plaintiff, and the other of which he derived from another source and conveyed to the defendant, there is no inconsistency and, therefore, no estoppel to prevent the defendant from denying that the plaintiff's grantor had title to the land in dispute.

The oral evidence of the defendant, which was not objected to, shows that Charles and A. H. Cranston derived their title to the "Badkins Tract" from one source and to the mill-pond tract from another source, and that they had disposed of their interest in the former before they acquired their interest in the latter.

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If we assume that the deeds under which the plaintiff claims "the Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the Cranstons were not estopped from subsequently purchasing the land in dispute, and would not have been estopped from purchasing the entire tract, because their deed to Ratcliff, trustee, was made merely for the purpose of securing a debt, contained no warranty of title, and, to use the language of Baldwin, J., in *Sutton v. Sutton*, 7 Gratt. (48 Va.) 234, 56 Am. Dec. 109, "the grantor undertook no responsibility either as to title or quantity."

The fact that the Cranstons conveyed the mill-pond tract to the Cambridge Manufacturing Company with special warranty is plausibly accounted for by the testimony of Charles Cranston himself, who says that the ninety-acre tract was conveyed by special warranty because of an adverse claim which had been asserted thereto by a third party who does not appear to, at any time, have had any interest in or claim to the "Badkins Tract."

The established and familiar general rule is that in an action of ejectment the plaintiff must recover upon the strength of his own title, which he must connect with the Commonwealth, or with a common source with that of the defendant. There are exceptions to the rule but this case does not fall within any of them. The defendant, for example, was not a mere trespasser or intruder but held a deed for the land under which he was exercising the acts of ownership and possession resulting in this suit.

Having reached the conclusion that the plaintiff failed to make out a *prima facie* case entitling her to recover, it becomes unnecessary to go at length into a discussion of the further question whether the deed under which she claims the "Badkins Tract" should be construed to extend to the edge or the middle of the stream. She claims to the middle, and the defendant claims between the middle and what was formerly the northern edge thereof. That the question of

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construction does not arise may be demonstrated by supposing that the defendant's deed, instead of covering only a part, had covered all of the "Badkins Tract." Either in the case supposed, or in the case as it exists, the plaintiff was bound in the first instance to make out her own title under the rule above indicated, and having failed to do so, her demurrer to the evidence should have been overruled.

We may add, however, that there was evidence tending to show that the former owners of the "Badkins Tract" had never in fact owned or claimed further than the edge of the pond; and that the southern boundary of that tract was indicated by an old and marked line following the high-water mark of the pond bed. In this state of the case, it by no means follows, as a matter of law, that the deed to D. W. Marston extended further than the northern edge of the pond. Riparian owners (on non-navigable streams) are presumed to own to the middle thread of the stream; and when they do own to the middle and convey by a deed calling for the stream as a boundary, they are conclusively presumed in law to convey to the middle, unless they expressly exclude that presumption by words in the conveyance. The presumption of ownership to the middle of the stream, however, is a rebuttable presumption, and yields to proof that the edge of the stream is the true boundary line. When this latter fact affirmatively appears, there can be no presumption that a deed calling for the stream was intended as a conveyance to the middle. A grantor is not presumed to intend to convey more than he owns.

For the foregoing reasons the judgment of the circuit court will be reversed, and this court will enter up judgment for the defendant upon the demurrer to the evidence.

Reversed.

Statement.

Mytherville.

JONES' ADMINISTRATORS V. COLEMAN.

June 14, 1917.

Absent, Burks, J.*

1. **BILLS AND NOTES—Cancellation.**—Under Code of 1904, section 2841-a, paragraph 123, where the date and signature on a promissory negotiable note had both apparently been destroyed by burning, the presumption is that the burning was intentional and done for the purpose of cancelling the instrument. This presumption can only be overcome by evidence showing that such burning was done "Unintentionally, or under a mistake, or without authority."
2. **BILLS AND NOTES—Cancellation—Case at Bar.**—A motion for judgment under section 3211 of the Code of 1904 was made by plaintiff against the administrators of a decedent, upon a promissory note alleged to have been made by the decedent payable to the plaintiff. To sustain the motion a mutilated paper in the handwriting of the decedent was presented, upon which there was neither date nor signature, both apparently having been destroyed by burning. Only one witness, a brother of plaintiff, was introduced by plaintiff to prove the existence of the note described in the notice. He was an ignorant man and his testimony was vague and unsatisfactory. No attempt was made to explain or account for the mutilation of the paper.

Held: That the evidence was insufficient to sustain a judgment for plaintiff.

Error to a judgment of the Circuit Court of Brunswick county, on a motion for judgment under section 3211 of the Code. Judgment for plaintiff. Defendant assigns error.

Reversed.

*Case submitted before Judge Burks took his seat.

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The opinion states the case.

Buford & Peterson and *W. R. Jones*, for the plaintiffs in error.

B. A. Lewis, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This proceeding was a motion under section 3211 of the Code, made by Kate D. Coleman against W. R. Jones and Jack Shell, administrators of Reps Jones, deceased, upon which there was a judgment in favor of the plaintiff.

The notice states that the plaintiff will move the court for judgment for the sum of \$500, and then uses this language: " * * * the same being evidenced by that certain promissory negotiable note, made by the said Reps Jones, deceased, bearing date on the 1st day of January, 1915, and payable to me at the Bank of Brunswick, Lawrenceville, Virginia, 365 days after date, which said note waives the benefit of the homestead exemption and was executed by the said Reps Jones, deceased, and is for the principal sum of five hundred (\$500.00) dollars."

A jury was waived and the case was submitted to the judge of the trial court. To sustain the motion a mutilated paper was presented, upon which there was neither date nor signature, both apparently having been destroyed by burning. The paper originally was a printed blank form of a negotiable note, payable at the Bank of Lawrenceville. This mutilated remnant shows that the figures "500" (succeeding the "\$" mark) and "365" (preceding the printed words "days after date"), the name "Kate D. Coleman," and the words "Five Hundred," had been inserted in ink. The evidence of those familiar with the handwriting of the decedent, Reps Jones, is sufficient to show that these words and figures were written by him.

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The only witness introduced by the plaintiff for the purpose of proving the existence of the note described in the notice was Beverly Coleman, a brother of the plaintiff. He is an ignorant man and his testimony is vague and unsatisfactory, amounting substantially to this: That the plaintiff had been a domestic servant of the decedent for fifteen or sixteen years prior to his death; that some time in the year 1914 he saw in his sister's room in a sewing-machine drawer a note for \$500 which had Mr. Reps Jones' name on it. Upon demurrer to the evidence, his testimony may be sufficient to identify the mutilated paper as constituting the remnant of the paper which he saw; he did not, however, remember the date of the paper which at that time was in an envelope; and after Jones' death his sister showed him a mutilated envelope and the mutilated paper above referred to, which in the meantime had been burned so as to present the appearance which it had when presented as the note sued on. It will be noted that the notice alleges that this note was dated January 1, 1915, and that this date was subsequent to the time when the witness said he saw the paper with Reps Jones' name on it. This is substantially all of the testimony, and there was no attempt to explain or account for the mutilation of the paper.

In our opinion this evidence is clearly insufficient to support the judgment.

Paragraph 123, section 2841-a of the Code, being section 123, Art. 8, of the negotiable instruments law, which is in accord with an established rule of evidence, reads thus: "A cancellation made unintentionally or under a mistake, or without the authority of the holder, is inoperative; but where an instrument, or any signature thereon, appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake, or without authority."

The language and meaning of the statute are clear and controlling. We can only speculate as to why the date and

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the signature, which we may assume were originally upon the paper presented, have been destroyed by burning. The presumption is that the burning was intentional and done for the purpose of cancelling the instrument. This presumption can only be overcome by evidence showing that such burning was done "unintentionally, or under a mistake, or without authority." The plaintiff has failed to sustain the burden which the statute clearly puts upon her.

For these reasons, the judgment must be reversed, and this court will enter judgment dismissing the motion.

Reversed.

Syllabus.

Higthenville.

KABLER'S ADMINISTRATOR V. SOUTHERN RAILWAY COMPANY.

June 14, 1917.

Absent, Burks, J.*

1. RAILROADS—*Injuries to Persons on or Near Tracks or Premises*—*Licensee*.—Where the evidence shows that the track where the casualty occurred habitually for many years with the knowledge of defendant had been used as a walkway by the public, it will be assumed that the decedent who met his death by being struck by an engine of defendant company at this point was a licensee to whom it owed the duty of ordinary care to avoid injuring him.
2. RAILROADS—*Injuries to Persons on or Near Tracks or Premises*—*Last Clear Chance*.—The last clear chance rule, which has frequently been applied to cases in which the plaintiff's negligence has continued to the very moment of the injury, is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril; and although his negligence may have continued until the accident happened, he may, nevertheless, recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so.
3. RAILROADS—*Injuries to Persons on or Near Tracks or Premises*—*Last Clear Chance—Case at Bar*.—Plaintiff's decedent, a licensee, met his death by being run down by an engine of defendant's, while walking on the track of defendant. The track was straight for several hundred yards at the place where the accident happened, it occurred in the daytime, and there was nothing to have prevented those in charge of the train from discovering plaintiff's intestate on the track, or the latter from seeing the approaching train, had each observed the duty of watchful vigilance. It was a cold, blustering day, and plaintiff's intestate, who was an old man, was walking slowly

*Case submitted before Judge Burks took his seat.

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against the wind, which was blowing his clothing backward from his person as he proceeded on his way, leaning forward, the better to face the wind.

Held: That under the evidence the jury would have been warranted in finding that the engineer in charge of the defendant's train, by keeping a reasonable lookout, inevitably must have discovered plaintiff's intestate on the track in time to have averted the accident; and, moreover, they might have found the existence of sufficient superadded facts and circumstances "to put a reasonable man upon his guard that the person upon the track pays no heed to his danger and will take no step to secure his own safety."

4. **DEMURRER TO EVIDENCE.**—Upon a demurrer to the evidence, if under the evidence the jury might have found for the plaintiff, had the case not been withdrawn from their consideration by the demurrer to the evidence, then the court must so find.

Error to a judgment of the Circuit Court of Campbell county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Alexander H. Light, for the plaintiff in error.

Coleman, Easley & Coleman and *R. B. Tunstall*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This action was brought by the administrator of Kabler to recover of the Southern Railway Company damages for the alleged negligent killing of his intestate. The administrator brings error to the judgment of the trial court sustaining defendant's demurrer to plaintiff's evidence.

We must assume for the purpose of this discussion that Kabler, at the time he met his death, was a licensee on the track of defendant, to whom it owed the duty of ordinary care to avoid injuring him, since the evidence shows that

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the track between the villages of Evington and Townfork where the casualty occurred, habitually, for many years, with the knowledge of defendant, had been used as a walkway by the public. The track was straight for several hundred yards at the place where the accident happened, it occurred in the daytime, and there was nothing to have prevented those in charge of the train from discovering Kabler on the track, or the latter from seeing the approaching train had each observed the duty of watchful vigilance.

It was a cold, blustering day, and Kabler, who was an old man, was walking slowly against the wind, which was blowing his clothing backward from his person as he proceeded on his way, leaning forward, the better to face the wind.

The doctrine of concurrent negligence and the last clear chance is lucidly treated by Keith, P., in *Southern Ry. Co. v. Bailey*, 110 Va. 833, at page 836, 67 S. E. 365, at page 366 (27 L. R. A. [N. S.] 379). The learned judge, at page 836, observes: "We have held in numerous cases that those controlling a railroad train approaching a depot or any other point at which it was reasonably to be expected that persons would be in danger, must use reasonable care to avoid doing them an injury. We have held in many cases that an engineer, seeing a person upon the track in the apparent possession of all his faculties, would have a right to suppose that such person would get out of the way of the approaching train; in other words, that to see a man upon the track is not necessarily to see that man in a position of danger, because, if in the possession of his faculties, and in the exercise of that care which is incumbent upon him, he looks out for an approaching train, he can reach in an instant a place of safety, and the peril of one upon the track cannot, therefore, be known to those in control of the train until it becomes apparent that he is unconscious of his danger, or so situated as to be incapable of self-protection, when it becomes the duty of those in charge of the train to

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do all that they can, consistent with their higher duty to others, to save him from the consequences of his own act. We have held that the duty of guarding an individual against injury, which the law imposes upon a railroad company, is no higher or greater than that which the individual owes to care for his own safety; that all men know that to be upon a railroad track along which trains are frequently moving is to be in a position of danger, and imposes upon the person so exposing himself the obligation to keep a constant lookout for his own protection."

The line of separation between the class of cases where there may not be and those where there may be a recovery by persons injured on railroad tracks finds illustration in numerous decisions of this court.

The case of *Tyler, Receiver, v. Sites' Admr.*, was twice reversed on writ of error (88 Va. 470; 13 S. E. 978; *Id.*, 90 Va. 539, 19 S. E. 174). Sites was a deaf mute and was struck while walking along the track of the Shenandoah Valley R. Co., meeting the train with his head bent down, when he was visible for nearly a mile. The court there held that persons in charge of a train have the right to assume that one walking on the track, apparently possessed of his faculties, will get off before the train reaches him, and denied a recovery.

So, in *Morton's Ex'or v. Southern Ry. Co.*, 112 Va. 398, 71 S. E. 561, the court affirmed a judgment for the defendant, where Morton, a man seventy years of age, was killed while crossing the railroad track on foot, at a point at which the track in the direction from which the train was coming was straight for at least one mile. When he reached the right of way, "his figure was bent, his head bowed, and his eyes fixed upon the ground," and he was walking slowly and feebly. The court held that the doctrine of the last clear chance did not apply, "since there was no evidence tending to show that there was something in the appearance of the deceased to suggest that he did not intend

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to remain in a place of safety until the train passed, or would be unable to clear the track after he had stepped over its west rail."

In *Chesapeake & Ohio Railway Co. v. Kidd*, 116 Va. 822, 83 S. E. 933, a recovery was likewise refused where it appeared that Kidd, "with full knowledge of his surroundings voluntarily stepped on the track where it was practically straight, with a clear view for over thirteen hundred feet in the direction from which the train was approaching. He kept no lookout for the train until he was struck, and there was nothing to indicate to those in charge that he was not conscious of his danger and would take no step to secure his own safety."

A recovery was also denied in the case of the *Chesapeake & Ohio Ry. Co. v. Saunders*, 116 Va. 826, 83 S. E. 374. The facts in that case were these: Saunders, a licensee, "an active, strong youth of eighteen years of age, in company with his younger brother, who was sixteen years old, had been picking up coal along the track of the defendant east of the Staunton station, and were returning, walking on the company's main line within the eastern limits of the city. From the point where they took the track they had walked west about four hundred and fifty feet when a train coming from the east ran up behind them. The younger brother heard the train and stepped out of the way, while the deceased, who was some eight feet in advance of his brother, appeared to be oblivious of his danger and * * * was killed." The track from the point of accident east was straight and the view unobstructed for more than eight hundred feet. "There was nothing in the circumstances attending the situation to bring to the knowledge of those in charge of the train any notice that the deceased was paying no heed to his danger and would take no step to secure his own safety."

We shall, in the next place, briefly notice some of the cases which fall within the influence of the qualification of the principle which we have been considering, laid down

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by Keith, P., in *Southern Railway Co. v. Bailey*, *supra*, 110 Va. at page 846, 67 S. E. at page 370 (27 L. R. A. [N. S.] 379), as follows: "If, however, it appears that those in control of a train, in the discharge of their admitted duty to keep a reasonable outlook, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance brought home to their knowledge, sufficient to put a reasonable man upon his guard, that the person upon the track pays no heed to his danger and will take no step to secure his own safety, then the situation changes and the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be a recovery."

The case of *Chesapeake & Ohio Railway Company v. Corbin's Admx.*, 110 Va. 700, 67 S. E. 179, is a typical case of that series. It was decided November 18, 1909, and the opinion in *Southern Ry. Co. v. Bailey* was handed down on March 10th, following. The same judges participated in the decision of both cases (Buchanan, J., being absent), and the opinions in both were unanimous. In *Corbin's Case* the court affirmed the judgment of the circuit court upon a demurrer by the defendant to the plaintiff's evidence in these circumstances: Corbin, who admittedly was a licensee on the track of the defendant was injured in the daytime within the yard limits of the railroad in the town of Covington. He was walking in a westerly direction on the southern track, and stepped off between the tracks to avoid an eastbound freight train. After the train had passed, he crossed the northern track diagonally, and pursued a westerly course, walking on the ends of the cross-ties outside the northern rail. He had proceeded in that manner a distance of twenty or thirty steps when he was struck from behind by a westbound freight train and fatally injured. The train that inflicted the injuries upon him was moving at the rate of ten or twelve miles an hour, and the engineer was leaning out of the side window of his cab. The position he was

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occupying when Corbin was struck was visible to a person standing on the end of the cross-tie where decedent was injured for the distance of one hundred and fifty or two hundred yards. He was looking forward in the direction of Corbin; Corbin was walking slowly along the ends of the cross-ties with an umbrella in his left hand, hoisted and the handle resting across his shoulder, and with his dinner bucket in his right hand. The position in which he was holding the umbrella cut off entirely his view of the train, and impaired his ability to hear the noise of its approach. While he was thus apparently wholly unconscious of danger, and seemed to be ill, the train was run down upon him without abating its speed, and without ringing the bell, blowing the whistle, or giving any other signal to warn him of impending death. From the time the engineer could have seen him, and ought to have seen him in the exercise of ordinary care, and discovered his obvious peril, the train could have been slowed down and he could have been apprised of danger by bell, or whistle, or even by spoken word, and his life spared. The court that tried the case was of opinion that the facts narrated would naturally have induced belief in a reasonable mind that Corbin was unconscious of his danger. The judges who participated in the decision of the case then thought, and the judges who constitute the court as at present organized still think, that the case was rightly decided, and that the request of counsel for the defendant in error that it be overruled should be denied. It is plainly, we think, within the qualification to the general rule formulated by Keith, P., in the *Bailey Case*. It may also be mentioned that the case has been referred to with approval in *Southern Railway Co. v. Bailey*, *supra*, 110 Va. p. 845, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *C & O. Ry. Co. v. Shipp*, *supra*, 111 Va. p. 381, 69 S. E. 925; *Southern Railway Co. v. Darnell*, 114 Va. 312, 76 S. E. 291; *Norfolk So. Ry. Co. v. Crocker*, 117 Va. 327, 331, 84 S. E. 681. Moreover, the

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court in *Corbin's Case*, cites twenty-two Virginia decisions and several authoritative text-writers sustaining the conclusions therein.

In *Chesapeake & Ohio Ry. Co. v. Shipp*, 111 Va. 377, 69 S. E. 925, Shipp was struck by a caboose car which was "jerked" on the main line in making a flying switch. The brakeman in charge of the caboose could have stopped it in twenty feet or less, but ran into Shipp, who was one hundred and thirty-five feet from where the caboose was "jerked," with his back in that direction, stooping over in a bending position, and engaged with a wrench in tightening bolts upon a fish-bar. Upon these facts the judgment in his favor was affirmed.

In *Southern Ry. Co. v. Baptist*, 114 Va. 723, 77 S. E. 477, the recovery was also sustained. Baptist, while in full view of the engineer in charge of an approaching train, and in time for it to have been stopped, was struggling with and dragged on the track by a frightened horse, which he had seized by the bridle in response to a call for help from the driver.

The latest case decided by this court germane to the discussion is that of *Norfolk, &c. R. Co. v. Crocker*, 117 Va. 327, 84 S. E. 681, where the recovery was upheld for personal injuries in these circumstances: Crocker, on the invitation of the conductor of the defendant, went upon the track and was examining a defective drawhead on the end of one of several flat cars standing on the track, coupled together. While thus engaged, the conductor, without warning to Crocker, signalled the engineman to couple his engine to the string of flat cars. When the coupling was made the cars were driven forward by the impact and Crocker was knocked down and severely injured. Kelly, J., in delivering the opinion of the court in this case, says: "The rule in question" (the "last clear chance") "which has frequently been applied to cases in which the plaintiff's negligence has continued to the very moment of the injury, is a qualification of the general rule that contributory negligence bars a

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recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may, nevertheless, recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so. This principle has been adopted by practically all the courts of last resort, both in England and in this country, and has been repeatedly endorsed by this court, some of the recent Virginia decisions containing a very full discussion of the subject, and an extended review of the authorities. *C. & O. Ry. Co. v. Corbin*, 110 Va. 700, 67 S. E. 179; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *C. & O. Ry. Co. v. Shipp*, 111 Va. 377, 69 S. E. 925. See also 1 *Shear. & Red. on Neg.* (6th ed.), sec. 99; 2 *Thompson on Neg.*, sec. 1737; 8 *Thompson on Neg.* (White's Supp.), sec. 1737."

Under the evidence in this case the jury would have been warranted in finding that the engineer in charge of the defendant in error's train, by keeping a reasonable lookout, inevitably must have discovered Kabler on the track in time to have averted the accident; and, moreover, they might have found the existence of sufficient superadded facts and circumstances "to put a reasonable man upon his guard that the person upon the track pays no heed to his danger and will take no step to secure his own safety." If, under the evidence, the jury might have made these findings had the case not been withdrawn from their consideration by the demurrer to the evidence, then, upon well settled principles, the court must so find.

The instant case is controlled by the second line of authorities to which attention has been called; and the judgment under review must be reversed, and judgment entered in favor of the plaintiff in error for the damages assessed by the jury.

Reversed.

Statement

Mytherville.**LEWIS v. LEWIS.**

June 14, 1917.

Absent, Burks, J.

1. **CONFESSIONS—Voluntary.**—A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.
2. **DIVORCE—Adultery—Evidence.**—Suit was brought by the plaintiff against the defendant to obtain a divorce on the ground of adultery. The charge of adultery was sought to be proved by a negro woman, a servant of the household, who, in effect, swore to the fact. The servant was plainly under the influence of the plaintiff, and her statements were improbable and inherently unreliable. A confession of the alleged paramour obtained by threats was also introduced. He testified that he protested his innocence at the time, and insisted that he was coerced by threats to sign the paper; that the statements it contained were utterly false, and that on no occasion had he been guilty of improper conduct with the defendant. In addition to the denials of defendant and her alleged partner in guilt, it was proved by several wholly disinterested witnesses that after the institution of the suit the plaintiff had on different occasions been seen by them in the company of the defendant caressing her, and that apparently the relations between them were of the most cordial and affectionate nature.

Held: That, it is the settled rule that the evidence to sustain the charge of adultery, which is a criminal offense, must be clear and convincing; and, that the evidence in this case falls far short of that standard.

Appeal from a decree of the Circuit Court of the city of Norfolk. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

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Thos. W. Shelton and Alfred Anderson, for the appellant.

W. L. Williams, Tunstall & Thom, for the appellee.

WHITTLE, P., delivered the opinion of the court.

This suit was brought by the appellant against the appellee to obtain a divorce on the ground of adultery, and from a decree denying the divorce and dismissing the bill this appeal was granted.

Though an answer under oath was waived, nevertheless, the defendant filed her answer duly sworn to, denying the charge of adultery in the most positive and explicit terms. She explains that Kirn (the alleged party to her guilt) all through her married life had been a frequent visitor at their home, both when the plaintiff was present and, at times, during his absence. His visits were entirely social, and made openly and with the knowledge of the plaintiff, and generally upon his invitation.

We deem it unnecessary to discuss the evidence in detail. The charge of adultery is sought to be proved by a negro woman, a servant of the household, who, in effect, swears to the fact, and by a so-called confession signed by Kirn. The servant was plainly under the influence of the plaintiff, and her statements are improbable and inherently unreliable. With respect to the alleged confession, the plaintiff employed two Washington city detectives to procure evidence against the defendant; and on the night of April 10, 1915, the plaintiff in company with one of these detectives (the other being stationed on the outside to watch) and another man, went to his house, and, finding Kirn there, the detective on threat, if he refused, to hand-cuff Kirn and take him to jail, procured his signature to the paper in evidence which was prepared by the detective. This paper contained a statement that Kirn on several occasions had been guilty of adultery with the defendant. Kirn,

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however, testified that he protested his innocence at the time and refused to sign the paper until Mrs. Lewis requested him to do so, saying: "I would not go to jail for any man." Kirn's version of this affair is contradicted by the depositions of the men who accompanied plaintiff to his home. When these parties entered the house they discovered nothing of a compromising character in the conduct of Kirn and the defendant; and he insists that he was coerced by threats to sign the paper; that the statements it contains are utterly false; and that on no occasion had he been guilty of improper conduct with the defendant.

In *Hampton v. Hampton*, 87 Va. 148, 151, 12 S. E. 340, 341, the court quotes from Greenleaf on Evidence as follows: "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." Greenleaf on Evidence, sec. 219.

In addition to the denials in the defendant's answer and in Kirn's deposition, it was proved by several wholly disinterested witnesses that after the institution of the suit the plaintiff had on different occasions been seen by them in company of the defendant caressing her, and that apparently the relations between them were of the most cordial and affectionate nature.

It is the settled rule that the evidence to sustain the charge of adultery, which is a criminal offense, must be clear and convincing, but the evidence in this case falls far short of that standard.

The decree appealed from is without error and must be affirmed.

Affirmed.

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Mythville.

MADDUX AND OTHERS V. BUCHANAN AND OTHERS.

June 14, 1917.

Absent, Burks, J.

1. **MECHANICS' LIENS**—*Necessity of Indebtedness to General Contractor—Case at Bar.*—Defendant entered into an agreement with a building contractor for the erection of a residence. After the work was less than half done, and after less than half of the total contract price had been paid, the contractor failed financially and surrendered the contract and the work to be done thereunder to the defendant, who proceeded to carry the same to completion under a provision of the contract that he might do so under such contingency, and that in such case the contractor should not be entitled to any further payment under the contract until the work should be wholly finished, at which time if the unpaid balance of the amount to be paid under the contract should exceed the expense incurred by the owner in finishing the work, such excess should be paid by the owner to the contractor; but if such expense should exceed such unpaid balance the contractor should pay the difference to the owner. Plaintiffs, who were subcontractors, to whom the contractor was indebted at the time of his failure, filed their claim for liens in conformity with section 2477, Code of 1904, and gave notice thereof to defendant and instituted separate suits in equity to enforce the same. These suits were brought before the building was completed, and defendant filed, first, an original answer in each case, exhibiting his contract, denying any indebtedness whatever to the general contractor, and averring that it would cost more than the balance of the contract price to finish the work, and, later, a supplemental answer exhibiting the certificate of the architect showing a balance due from the contractor of \$4,756.49. Upon reference to a commissioner a report was made upon evidence which was extensive and thorough, fully sustaining the position assumed by defendant in his answer.
- Held:* That as it satisfactorily appears from the evidence that there was no time after notice to the defendant of the claim

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- of the subcontractors when he was indebted in any amount to the general contractor, consequently he was under no liability towards the subcontractors.
2. **APPEAL AND ERROR—*Commissioner's Report.***—There is a strong presumption in the appellate court in favor of a decree by which the trial court has confirmed the report of a commissioner upon a question of fact.
 3. **MECHANICS' LIENS—*Owner's Liability.***—Laborers and material men are favored by the statute, but not to the extent of requiring the owner of property to pay the same bills twice, once to the builder with whom he has contracted, and again to parties with whom he has no contractual relations. The present mechanic's lien laws deal fairly with both the owner and the subcontractor, requiring the owner, after notice, to withhold from the general contractor enough to pay the subcontractor, provided however, "the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given, or may thereafter become indebted by virtue of his contract with said general contractor."
 4. **MECHANICS' LIENS—*Compliance with Terms of Statute.***—The statute was designed to protect subcontractors, and creates a liability which would not otherwise exist, but its terms must be met before its benefits can be enjoyed. In other words, the owner is under no obligation to protect the interest of the subcontractor, except where the latter has complied with the law and thus placed himself in a position to demand protection from the owner.
 5. **MECHANICS' LIENS—*Contract Between Owner and General Contractor—Recording Contract.***—There is no statute requiring the recordation of a contract between an owner and a general contractor, providing for the completion of a building by the owner upon the failure of the general contractor, and there is no rule of law making the owner a trustee for subcontractors in such cases. Upon the contrary, an owner has the right to make just such a contract as that referred to in the first syllabus without regard to subcontractors. A subcontractor can have no legitimate claim upon the owner, except under and by virtue of the statute. And, while it would not be competent for an owner to defeat the statutory rights of a subcontractor by a stipulation in the general contract against liens, or to assist the general contractor in placing a *bona fide* asset beyond the reach of his creditors by any subterfuge embodied in the terms of the general contract, the settled general rule is that a subcontractor is charged with

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notice and bound by the terms of the general contract, and this rule applies especially to the mode and terms of payment agreed upon between the owner and the general contractor.

6. **MECHANICS' LIENS—Account Between General Contractor and Owner.**—Included in the sum found by a commissioner as the balance due from a general contractor to the owner was an item for liquidated damages, which the subcontractors contended was an error in the record.

Held: That the question was not material so far as the subcontractors were concerned, where with that item eliminated there was still nothing due from the owner to the general contractor upon which their claims could attach.

7. **APPEAL AND ERROR—Presumption in Favor of Lower Court's Finding.**—A decree sustained an exception to the deposition of a witness and this was assigned as error. Counsel were not agreed and the record was not clear as to the facts upon which the exception to this deposition should be disposed of, and the presumption, therefore, is that the action of the lower court was right.

8. **APPEAL AND ERROR—Harmless Error—Exclusion of Deposition.**—The exclusion by the court below of a deposition of a witness is harmless, there being nothing to indicate that the commissioner did not consider the deposition in making up his report; and, the appellate court having considered it, being of the opinion that it could not in any event have properly changed the result.

9. **MECHANICS' LIENS—Architect's Certificate.**—In mechanic lien proceedings the certificate of the architect, showing that no indebtedness existed from the owner to the general contractor, made in compliance with one of the provisions of the building contract, in the absence of either allegation or proof of bad faith on his part, must be accepted as conclusive.

Appeal from a decree of the Circuit Court of Loudoun county. Decree for defendants. Complainants appeal.

Affirmed.

The opinion states the case.

J. Donald Richards, W. H. Martin and R. R. Farr, for the appellants.

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E. E. Garrett, for the appellees.

KELLY, J., delivered the opinion of the court.

James A. Buchanan entered into a written agreement with John H. Nolan, a building contractor, whereby the latter agreed to furnish for the former all the material and labor necessary for the erection of a costly residence. After the work was less than half done, and after less than half of the total contract price had been paid, Nolan failed financially and surrendered the contract and the work done and to be done thereunder to Buchanan, who proceeded to carry the same to completion under the following provision of the contract:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to any further payment under this contract until the said work shall be wholly finished, at which

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time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided either for furnishing materials or for finishing the work, and any balance incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

There is some controversy as to whether this clause in the contract was strictly complied with, but it is entirely clear from the evidence that there was such compliance, and the certificate of the architect, made after the building was completed, showed that Nolan was indebted to Buchanan in the sum of \$4,756.49.

The appellants, Maddux and others, were sub-contractors who had furnished labor and material to Nolan, and to whom he was indebted at the time of his failure and surrender of the contract. Having filed their claim of liens in conformity with section 2477 of the Code of Virginia, and given notice thereof to Buchanan, they proceeded to institute their separate suits in equity to enforce the same. These suits were brought before the building was completed, and Buchanan filed, first, an original answer in each case, exhibiting his contract, denying any indebtedness whatever to the general contractor, and averring that it would cost more than the balance of the contract price to finish the work, and, later, a supplemental answer exhibiting the certificate of the architect and showing a balance due from the contractor of \$4,756.49.

The several causes, which were heard together, were referred to a commissioner for a report upon a number of questions, but the gist of the inquiry, so far as it affects this appeal, was whether Buchanan owed Nolan anything at the time the contract was surrendered, or would owe him any-

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thing when the work was completed. The commissioner, upon evidence which was extensive and thorough, made a report fully sustaining the position assumed by Buchanan in his answer. Complainants excepted to this report and the circuit court, after mature consideration, overruled the exceptions, confirmed the report, and dismissed the bills at the cost of complainants.

The decree was right in all respects. It, of course, comes to us with the strong presumption in its favor attaching to a decree by which the trial court has confirmed the report of a commissioner upon a question of fact (*Hall v. Hall*, 104 Va. 773, 776, 52 S. E. 557, and cases cited); but, independently of that presumption, the evidence satisfies us that there was no time after notice to General Buchanan of the claim of the appellants when he was indebted in any amount to the general contractor; and this is necessarily the end of the case. Laborers and material men are favored by the statute, but not to the extent of requiring the owner of property to pay the same bills twice, once to the builder with whom he has contracted, and again to parties with whom he has no contractual relations. Our present mechanic's lien laws deal fairly with both the owner and the sub-contractor, requiring the owner, after notice, to withhold from the general contractor enough to pay the sub-contractor, provided however, "the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given, or may thereafter become indebted by virtue of his contract with said general contractor." (Code, sections 2477, 2479). The sub-contractor will generally be as well situated as the owner to determine whether the general contractor is solvent. To do more than our statute has done in relieving the sub-contractor of risk in this respect would be to make the owner of a building the guarantor of all the bills incurred thereon by the general contractor. This would unjustly, if not unconstitutionally, abridge the right of contract. The statute

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was designed to protect sub-contractors, and creates a liability which would not otherwise exist, but the terms must be met before its benefits can be enjoyed. In other words, as this court has said in former decisions, "the owner is under no obligation to protect the interest of the sub-contractor, except where the latter has complied with the law and thus placed himself in a position to demand protection from the owner." (*Schrieber v. Bank*, 99 Va. 257, 262, 38 S. E. 134, 135; *University of Va. v. Snyder*, 100 Va. 567, 581, 42 S. E. 337; *Steigleder v. Allen*, 113 Va. 686, 691, 75 S. E. 191.)

The authority of the case of *S. V. R. R. Co. v. Miller*, 80 Va. 821, relied upon by counsel for appellants, in so far as it is at variance with the view here expressed, has been entirely destroyed by the subsequent change in the statute, which now very justly limits the liability of the owner to his indebtedness to the general contractor at or after the time he received notice of the sub-contractor's claim.

In Burks' Pleading and Practice, page 821, section 421, the author, after stating, as pointed out by counsel for appellants, that the sub-contractor is given by the statute three different methods by which he may secure the payment of the amount due him, namely, (1) by filing an independent lien, (2) by taking steps to hold the owner personally liable, and (3) by invoking the benefit of the general contractor's lien, makes it perfectly clear that each of these three methods is dependent upon and limited by the indebtedness of the owner to the general contractor.

But it is said that the contract between Buchanan and Nolan was not recorded, that the sub-contractors had no notice and were not bound by its terms, and that the owner, therefore, became a trustee for the sub-contractors, and should have protected himself by requiring a bond of the general contractor.

There is no statute requiring the recordation of such contracts, and there is no rule of law making the owner a trustee for sub-contractors in such cases. Upon the con-

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trary, an owner has the right to make just such a contract as was made in this case, without regard to sub-contractors. The authorities already cited emphasize the principle that a sub-contractor can have no legitimate claim upon the owner, except under and by virtue of the statute. And while it would not be competent, under what we regard as the better, though not the universal rule, for an owner to defeat the statutory rights of a sub-contractor by a stipulation in the general contract against liens, or to assist the general contractor in placing a *bona fide* asset beyond the reach of his creditors by any subterfuge embodied in the terms of the general contract, the settled general rule is that a sub-contractor is charged with notice and bound by the terms of the general contract, and that this rule applies especially to the mode and terms of payment agreed upon between the owner and the general contractor. See 2 Jones on Liens, sec. 1289; Phillips on Mechanics' Liens, sec. 58, p. 94; 20 Am. & Eng. Enc. L., pp. 362, 363, 27 Cyc. 93, 94; *McCrary v. Bristol Bank*, 97 Tenn. 469, 37 S. W. 543; *Ewing v. Folsom*, 67 Iowa 65, 24 N. W. 595.

What has been said disposes of the principal assignments of error. The remaining ones are of minor importance and will require only a brief discussion.

Included in the sum found by the commissioner as the balance due from Nolan to Buchanan was an item for liquidated damages, under a clause in the contract providing for a payment by the contractor of \$10 per day after a certain date until the work was completed. Appellants contend that it was error in the report and decree to so find. The question is not material, so far as appellants are concerned, for the reason that the item in question was only about half of the total balance found against Nolan, and with that item eliminated there would still be nothing upon which the claims of appellants could attach, either as liens or as grounds of personal liability against Buchanan.

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The decree complained of sustained the exceptions of counsel for appellee to the deposition of the witness, W. L. Brown, and this is assigned as error. Counsel are not agreed and the record is not clear as to the facts upon which the exception to this deposition should be disposed of, and in this state of the case, the presumption is that the action of the lower court was right. But the appellants have not, in any view of the matter, been prejudiced. The deposition was before the commissioner and was returned by him with his report along with the other evidence in the case. There is nothing to indicate that he did not consider the deposition in making up his report, and it seems clear that, at least so far as the commissioner was concerned, appellants get the benefit of Brown's testimony. However this may be, it is in the record before us, we have considered it, and we do not think it could in any event have properly changed the result.

The last assignment of error is that "the certificate of the architect is not binding upon any one, under the conditions as set forth in this petition, and the evidence in this cause, especially upon the sub-contractors, as the architect, in his certificate, made no reference to the fact of the material or work of the sub-contractors which he used or the amount of work performed by Nolan on the fourth payment."

The answer to this contention is two-fold. In the first place, the report of the commissioner and the decree confirming the same do not rest upon the architect's certificate, except in so far as it may have been considered by the commissioner and the court along with the deposition of the architect and all the other evidence in the cause. In the second place, the proposition upon which the assignment is predicated is, in itself, unsound. We have already seen that the appellants were dependent upon the existence of an indebtedness from Buchanan to Nolan, and that this indebtedness must have arisen in accordance with the terms of the contract between those two parties. The certificate

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of the architect, showing that no such indebtedness existed, was made in compliance with one of the provisions of that contract, and in the absence of either allegation or proof of bad faith on his part, must be accepted as conclusive. This is the law in Virginia, and elsewhere generally. *Condon v. South Side R. R. Co.*, 14 Gratt. (65 Va.) 302, 313; *N. & W. R. Co. v. Mills & Fairfax*, 91 Va. 613, 629, 22 S. E. 556; *Johnston v. Bunn*, 108 Va. 490, 495, 62 S. E. 341, 19 L. R. A. (N. S.) 1064; 6 R. C. L., p. 962, sec. 340; 6 Cyc. 40; 9 C. J. 772.

There is no error in the decree of the circuit court, and it must be affirmed.

Affirmed.

Wytheville.**MOORMAN V. BOARD OF SUPERVISORS OF CAMPBELL COUNTY.**

June 14, 1917.

Absent, Burks, J.

1. **EXECUTIONS—Return After Return Day—Limitation of Actions—Judgments.**—A valid return may be made after the day to which the execution is returnable. In the case at bar, the executions were returned "no effects" two days after the return day. This was clearly within a reasonable time, and, therefore, the returns were made in the lawful performance of a delayed duty. Such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions.
2. **PROCESS—Mandamus—Return of Process Ministerial Act.**—The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary.
3. **EQUITY JURISDICTION—Complete Relief.**—Where a court of equity acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end.
4. **EQUITY JURISDICTION—Administration of Estates—Judgment Against Distributee—Marshalling Assets.**—The estate of an intestate was being fully administered by a court of equity. All of the persons interested in the funds were before the court, and there were no other claimants thereof, nor any intervening liens or equities in favor of any other persons. The court directed that the entire interest of an heir and distributee, in the personal as well as in the real estate, should be applied towards the satisfaction of judgments against him, upon which no executions had issued. The continuing right to issue executions upon the judgments was clear. It

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was argued that this was error, because, there being no valid execution outstanding, there was no specific lien upon the distributee's interest in the personal estate.

Held: That the action of the court might be justified upon two grounds: First, that the court having acquired jurisdiction could retain it and do complete justice between the parties; and secondly, that as it appeared that the attorneys of the distributee and heir had a lien for their fees upon his entire interest, both real and personal, and the lien of the judgments being only upon the real property, the court, if necessary, would have marshalled the assets and applied the fund arising from the personal estate, first, towards the satisfaction of the lien of the attorneys for their fees so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments.

Appealed from a decree of the Circuit Court of Campbell county. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Caskie & Caskie and *Wilson & Mason*, for the appellant.

Frank Nelson and *Alexander H. Light*, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The question in this case arises out of this state of facts: Winnington L. Moorman died leaving a considerable estate of which the appellant, Thomas B. Moorman, his brother, inherited one-sixth. Winnington L. Moorman had made a will, but in a suit instituted for that purpose the will was set aside as to its most important provisions. The board of supervisors of Campbell county then instituted its suit for the purpose of subjecting the interest of the appellant in the estate of Winnington L. Moorman to the lien of a judgment recovered many years theretofore. The two suits were thereafter heard together, and in addition to the judgment reported in favor of the board of supervisors of

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Campbell county, the commissioner reported another judgment against the appellant in favor of the county school board of Campbell county. The estate consisted of real and personal property, and is being distributed under the direction of the court in these suits.

1. The first assignment of error is, that the judgments are barred by the statute of limitations, under section 3577 of the Code. It is contended that no valid returns were made upon the first executions issued, which were returnable to the rules on the first Monday in June, 1898, and that, therefore, the ten year limitation applies.

These returns both read thus: "No effects. June 8, 1898. R. L. Perrow, sheriff." The allegation is, that as the first Monday in June, 1898, was June 6th, and the returns are dated June 8, 1898, therefore the sheriff was without authority and these returns are invalid.

In *Hamilton v. McConkey*, 83 Va. 533, 2 S. E. 724, the return was, "Not levied by reason of stay law;" and the court determined that to be a sufficient return under the statute, as it then read, to make the limitation twenty years, saying, among other things, that "the question is not whether the return is true or false, sufficient or insufficient."

In *Rowe v. Hardy*, 97 Va. 675, 34 S. E. 625, 75 Am. St. Rep. 811, the subject is fully and clearly discussed by Riely, J. The return there was in this language: "Return this execution by order of attorney for the plaintiff. J. C. Rowe, D., for J. L. Waterman, S. G. C." The execution was returnable to February rules 1870, and it was not lodged in the clerk's office until March 19, 1870. This was determined to be a sufficient return to make the limitation twenty years. Since the dates of those returns the statute, by the Code of 1887, has been amended, and the last clause of section 3577 now reads: "Any return by an officer on an execution showing that the same has not been satisfied shall be a sufficient return within the meaning of this section."

In *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055, 17 Ann. Cas. 456, the return was, "No effects known to me this 8th

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day of November, 1889," but was not signed, and the sheriff was permitted to amend his return in 1908 by having the deputy who made the return upon the original execution sign it.

The clear and necessary implication of section 901 of the Code is that a valid return may be made after the day to which the execution is returnable, because it subjects an officer failing to make returns to a fine "for each month subsequent to the judgment that the failure may continue, or until it appear that the return cannot be made, or, if it be the case of an execution or warrant of distress, until it appear that the amount thereof is paid to the party entitled." This statute would fail to accomplish its manifest purpose if such belated return by an officer, which may be thus enforced, is an invalid return. Indeed, if any public official fails to perform a duty upon the date upon which the law requires it to be performed, then he should certainly discharge that duty as soon thereafter as possible, and private rights should not be imperiled by the failure of an official to do his duty upon a specified date. The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary. An execution may not be levied after the date upon which it is returnable, and the imperative duty to return does not arise until it is no longer possible to levy it. The life of the execution ends upon the date to which it is returnable, and the duty to return it then arises. That duty should be promptly performed.

Dr. Lile, in an illuminating note on *Rowe v. Hardy*, in 5 Va. Law Reg. 672, says this: "Another point of equal importance, likewise settled most satisfactorily in the opinion, is, that the return of an execution is valid though made after the return day. How long afterwards, would doubt-

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less depend upon the peculiar circumstances of the case, and especially upon the existence or non-existence of intervening equities of third persons acquired in reliance upon the absence of a return. If justice required it, and there were no rights of innocent third persons affected, doubtless there is no specific limit to the time within which a valid return of an execution may be made, even though the sheriff's term of office may have expired in the meanwhile."

In this case the executions were returned two days after the return day, and this was clearly within a reasonable time; therefore the returns were made in the lawful performance of a delayed duty. Manifestly such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions.

The trial court rightly decided that the judgments here attacked were valid and subsisting liens, and that the right to issue executions thereon had not expired.

2. Another question arises out of the fact that a second execution had been issued on one of these judgments, the purpose apparently being thereby to acquire a lien upon the share of appellant in the personal estate of Winnington L. Moorman. This execution was adjudged to be invalid, upon the motion of appellant, and the appellee has apparently acquiesced in that decree. The court, however, directed that the entire interest of the appellant in the personal as well as in the real estate should be applied towards the satisfaction of the judgments. It is argued by the appellant that this was error, because, there being no valid execution outstanding, there was no specific lien upon appellant's interest in the personal estate. This is true, but, nevertheless, this action may be justified upon two grounds:

(a) Upon the well settled equitable doctrine, which is thus succinctly expressed in *Laurel Creek, &c. Co. v. Browning*, 99 Va. 529, 39 S. E. 158: "Where a court of equity acquires jurisdiction of a cause for any purpose, it will retain

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it and do complete justice between the parties, enforcing if necessary legal rights and applying legal remedies to accomplish that end."

While it is hardly necessary to cite authority in support of this rule, we note that it has been applied in Virginia in *Moore v. White*, 3 Gratt. (44 Va.) 143; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Woolfolk v. Graves*, 113 Va. 190, 69 S. E. 1039, 73 S. E. 721.

This rule should be applied here. The estate of Winnington L. Moorman was being fully administered. All of the parties interested in the funds were before the court, and there were no other claimants thereof, nor any intervening liens or equities in favor of any other persons. The continued right to issue executions upon the judgments was clear, and the court properly directed the application of the proceeds of the personal property belonging to appellant to the satisfaction of his debt to the appellees.

(b) The decree can also be sustained by the application of that favorite of equity, the doctrine of marshalling of assets and securities. In the course of the litigation the attorneys who had represented the appellant as one of the heirs at law, and had succeeded in setting aside the will of Winnington L. Moorman and thus establishing his rights, were adjudged, under their contract, to be entitled to one-third of his interest in the decedent's estate, real and personal. Inasmuch as the lien of the attorneys for their fees was upon both the real and personal property, and the lien of the judgment only upon the real property, the court, if necessary, would have marshalled the assets and applied the fund arising from the personal estate, first, towards the satisfaction of the lien of the attorneys for their fees so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments. This established doctrine has been frequently enforced in Virginia, and the cases are collected in 9 Enc. Dig. Va. & W. Va. Rep., p. 595.

The decree will be affirmed.

Syllabus.

Mythville.

**NORFOLK AND WESTERN RAILWAY COMPANY V. HAYDEN
AND OTHERS.**

June 14, 1917.

Absent, Burks, J.

1. **WATERS AND WATERCOURSES—*Flooding Lands—Limitation of Actions.***—Where the injury complained of arose from the flooding of complainant's lands by reason of defendant's dam—a permanent structure—the cause of action for such injury arose at the time of the first commencement of the injury following the original erection of the dam and the right of action for all such injury, past, present and future was barred by the statute of limitations after the expiration of five years thereafter, unless there is something to take the case out of the general rule on the subject.
2. **STATUTES—*Retroactive Construction—Milling Acts.***—The milling act forfeiture provision, as contained in the Code of 1887, section 1356, providing that if a mill be at any time rendered unfit for use and the rebuilding or repair thereof shall not within two years from the time of such unfitness be commenced, "the title to the land so circumstanced shall revert to the former owner, his heirs or assigns and the leave so granted shall be in force no longer," is not retroactive, and the same is true of all the preceding milling acts.
3. **WATERS AND WATERCOURSES—*Milling Act.***—If the dam in the instant case was built under the milling acts, the question of whether the forfeiture provision is applicable must be decided by reference to the milling act in force when such dam was built.
4. **WATERS AND WATERCOURSES—*Milling Acts—Forfeiture—Limitation of Actions.***—The milling act of February, 1745 (5 Hen. Stat. 360), the act in force when the dam in the instant case was built, provided no forfeiture penalty in case the mill was rendered unfit for use and not rebuilt within a certain time. There is, therefore, nothing in that act to take the case out of the operation of the statute of limitations, as stated in the first syllabus.
5. **WATERS AND WATERCOURSES—*Milling Acts—Forfeiture.***—Where the predecessors in title of the defendant owned the land on

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both sides of the stream, on which the dam was built, the forfeiture penalty provision of the milling act of October, 1785 (12 Hen. Stat. 187), extending only to the forfeiture of the one acre of land condemned for the abutment of one end of the dam to rest on, could not apply.

6. **WATERS AND WATERCOURSES—Flooding Lands—Limitation of Actions—Milling Acts.**—The preponderance of evidence in the instant case fails to show that the dam in question was established under any of the milling acts. Hence, the plaintiff has failed to establish his right to rely upon such acts, or any of them, to take the case out of the operation of the statute of limitations.

Appeal from a decree of the Circuit Court of Nottoway county. Decree for complainant. Defendant assigns error.

Reversed.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is a suit in equity by appellee, plaintiff in the court below, against appellant, defendant in the court below (hereinafter referred to as plaintiff and defendant), for an injunction prohibiting the defendant from any longer maintaining a certain dam located across Lazaretto creek a short distance below the lands claimed to be owned by the plaintiff, the latter located, on one side of and extending to the original bed of such creek, by reason of which dam from twenty to thirty acres of the alleged lands of plaintiff are overflowed by the waters of such creek—and to compel the defendant to cut such dam; and for damages heretofore caused to the alleged lands of the plaintiff by the overflow thereof and their lack of drainage, caused by said dam.

There was a demurrer to the bill which was overruled. (No detailed statement need be made with reference to one ground of demurrer which was sustained and an amendment allowed and made covering same, as this is immaterial). But in the view we take of the case on the merits we need not pass upon the action of the court below in overruling the demurrer.

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A number of interesting and important questions are raised by the record, the assignments of error and the able argument of counsel for plaintiff and defendant, but, in our view of it, one aspect of the case is decisive of it, so that it will be unnecessary for us to go beyond a statement of the facts bearing upon this view of the case.

The vital issue, evolved from the record by the assignments of error and the argument of counsel, is—what effect have the milling acts in this State, cited and relied on by counsel for plaintiff, upon the rights of the defendant to maintain and continue the dam in question?

Our statement of facts will be confined to those material to that question.

FACTS.

The defendant owns and derived title to the land on which the said dam is situate, including a short distance on both sides of said creek above and below the dam, and a short distance beyond the ends of the dam abutting on both sides of said stream, by an unbroken chain of title extending back as far at least as to a deed from one Peter Randolph, Jr., to Francis Fitzgerald, Sr., of date September 2, 1911—as is conceded by brief of counsel for plaintiff. The plaintiff has not and does not claim any title to this land.

The plaintiff claims however, to own land on one side of said stream, extending to the original bed or to the thread of the stream, which land is located up stream, above said dam and above the strip of land owned by defendant aforesaid on which the dam is located—the land alleged to be owned by plaintiff which is overflowed and flooded by the back water of such stream caused by said dam consisting of some twenty to thirty acres, as aforesaid.

Further,

The plaintiff claims that the said dam “was built under the milling acts” of Virginia by one John Winn some time

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prior to June 7, 1798, as appears, it is alleged from the following orders of court of Nottoway county in which said dam is located:

"In _____ Court of said county, June 7, 1798, Old Order Book No. 2, page 157:

"On motion of Peter Randolph by George Craghead, his attorney, and for reasons appearing to the court, a further time of twelve months, is allowed him from this day to rebuild the mill formerly John Winn's on the Lazaretto creek in this county, with a dam to stagnate the same water which said Winn was formerly entitled to."

In _____ Court of said county, June 6, 1799, Old Order Book No. 2, page 321:

"On motion of Peter Randolph and for reasons appearing to the court a further time of twelve months from this day is granted him to rebuild the mill formerly John Winn's on Lazaretto creek in this county, with a dam to stagnate as much water as the said Winn was entitled to."

The deeds appearing in the record evidence that one John Winn owned the land above mentioned on both sides of said creek on which said dam is situate as aforesaid, included in a larger tract, at some time during the period between February 6, 1758, and April 13, 1782.

Therefore, if the dam in question "was built under the milling acts" by John Winn, this must have been done between February 6, 1758, and April 13, 1782, or say, between 1757 and 1783.

THE MILLING ACTS.

Between the dates 1757 and 1783 the milling act in force was that of February, 1745, the material parts of which are as follows:

"II. * * * any person or persons willing to build a water mill on some convenient run and having land only *on one side* thereof, shall petition the court of that county wherein the land *on the other* side of such run lie, for one acre to

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be *laid off*, which court is hereby authorized and required upon such petition * * * to issue their order to the sheriff commanding him to summon a jury of twelve free holders of the vicinage to meet upon *the land petitioned for*; who being met * * * shall diligently view and examine the said land and the lands adjacent thereto, on both sides of the run * * * which may be affected or laid under water by building such mill, together with the timber and other conveniences thereon, and shall report the same, with the true value of the *acre petitioned for*, and of the damages to the party or any other person or persons * * * to the court whence such summons issued * * *; and thereupon, if it appears reasonable to such court, and if it take not away houses, orchards or other immediate conveniences, then they may and are hereby authorized and empowered to grant *such acre* to the petitioner and order the return thereon made to be recorded; which shall be a good and effectual seizin in law to the petitioner paying down the valuation money of *the land* and damages reported by the jury to the party or parties legally entitled thereto, and shall create a *fee simple* in the said *acre of land* to the petitioner, his heir or heirs" * * *.

"III. * * * that no person or persons whatsoever, after passing this act, shall erect any mill, notwithstanding he or she has land *on both sides* of a creek or run * * * without petition first exhibited to the county court, who are to consider whether the adjacent lands of other persons will be affected thereby; and in that case to order a jury to value the damages and make report thereof in manner hereinbefore directed, and thereupon to grant or reject such petition; but when the petitioner's land extends so far on both sides as not to affect or overflow the land of any other person, the court may, if they see cause, grant leave to the petitioner for erecting such mill, without ordering any jury. And if any person shall thereafter presume to build

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any mill without such leave first had, he or she *shall be liable to the action of the party grieved for his or her damages.*" (5 Hen. Stat. 360). (Italics supplied.)

It was not until the act of October, 1785, that any penalty was added to said statute law as it was in force under the act of February, 1745, other than the liability to "the party grieved" in an action *for damages*. By the act of October, 1785, section II of the said former act was amended, by the addition of the following:

"* * * But if he shall not within one year thereafter" (after the order of court aforesaid) "begin to build the said mill and finish the same in three years and afterwards continue it in good repair for public use, or in case the said mill or dam be destroyed, if he shall not begin to rebuild it within *one* year after such destruction, and finish it within *three* years, then *said acre of land shall revert to the former proprietor and his heirs*" * * *. 12 Hen. Stat. 187 (Italics supplied.)

It was not until the act of March 2, 1819, that there was added any further penalty to the penalty aforesaid, of forfeiture to the former proprietor or his heirs of the *one acre* of land condemned, for failure on the part of the mill owner whose mill "was built under the milling acts" to begin reconstruction within *one* year and complete it within *three* years in case the mill or dam was destroyed. That is to say:

After providing in section 6 substantially the same penalty above shown, as contained in the act of October, 1785, as follows: "* * * *the title to any land condemned under this act shall revert to the former owner, his heirs or assigns*" (i. e., the title to the one acre condemned thereunder for the abutment of one end of the dam), there was added by the act of March 2, 1819, the further penalty—"and the leave granted by the court to erect any such mill * * * or dam shall cease and be void."

2 Rev. Code 1819, p. 227. (Italics supplied.)

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In subsequent milling acts it was provided, in effect, that if necessary therefor, more than one acre might be condemned for an abutment or abutments of the dam; that the owner of land on any water course, whether he owned the land on either side of it at the point where the dam was desired to be erected or not, might petition the court as aforesaid; and that condemnation proceedings aforesaid might be had by one proposing to build "a water mill, water grist mill or other machine, manufactory or engine, useful to the public."

In the act of March 2, 1819, it was provided that the jury, in execution of the writ of *ad quod damnum*, should "locate and *circumscribe* by certain metes and bounds" *the one acre* aforesaid petitioned for "for an abutment" for the same.

In the milling acts subsequent to that of March 2, 1819, it was provided that if the "*mill manufactory, machine or engine* be at any time destroyed or rendered unfit for use," (leaving out any reference to the "dam" in this connection) "and the rebuilding or repair thereof shall not within two years from the time of such destruction be commenced," (instead of within *one* year as formerly) "and within *five* years" (instead of *three* as formerly) "from that time be so far finished as then to be in good condition for use, *the title to the land so circumscribed* shall revert to the former owner, his heirs or assigns and the leave so granted shall then be in force no longer" * * * (see Acts Assem. 1821-2, p. 23; Acts Assem. 1825-6, p. 32; Code 1849, pp. 328-9, 330; Code 1887, sec. 1347 to sec. 1356.)

(The other milling acts subsequent to 1745—which, however, are not material to the instant case beyond what has been said of them above—are as follows: Code 1814, p. 277; Acts Assem. 1806, p. 12, Code of Va. 1887, sec. 1356).

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As to the Repair of the Mill.

"Some time in November, 1910 * * * The mainwheel of the mill in the instant case was broken, rendering the mill" unfit for use. The mill was not subsequently used until "December 2, 1913." Repair work on the mill was begun in "November, 1913," and completed "December 2, 1913."

The use of the mill by defendant, beginning with December 2, 1913, for grinding grist was a nominal one only. The real use made of the mill pond by defendant was that of pumping water therefrom to supply its needs in its business as a railway company. This use has been made of this mill pond by defendants since June, 1912.

Other Facts.

This suit was instituted in January, 1915.

The dam in question had then been unbroken, ponding the water of said creek back and flooding the said land of plaintiff continuously from about January 1, 1907, as maintained by the defendant and its immediate predecessors in title—a period of eight years. Prior to that time this dam had been in existence, maintained by the predecessors in title of the defendant, so ponding the water of said creek and flooding the said land of plaintiff and his predecessors in title continuously, since its erection, over a century before, according to the record, except when the dam was temporarily broken by freshets and would remain awhile unrepaired; and the affirmative and uncontradicted testimony of the oldest inhabitants of that locality is to the effect that at no time within the memory of living witnesses up to January, 1915, was the dam left broken and unrepaired as long as two years at any one time.

The decree complained of was entered by the court below on May 31, 1916, and, so far as material is as follows:

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“* * * it appearing to the court that the dam across Lazaretto creek creating the Fitzgerald mill-pond was established under the milling acts of the State of Virginia, and that the defendant by failing to commence the repair of the mill within the time required by law, between the years 1910 and 1913 forfeited their right to maintain the said dam, and have no authority to maintain the said dam, and flood the lands of M. M. Hayden, the court doth adjudge, order and decree that the prayer of said bill be granted, and the defendant is hereby ordered and directed to cut the said dam across Lazaretto creek and permit the water to flow without interruption or hinderance in the channel of said creek. And it is further ordered that the question of damages to the land of M. M. Hayden by reason of the flooding of said Hayden's land be and is hereby reserved for the further decrees of this court.”

F. S. Kirkpatrick and W. Moncure Gravatt, for the appellant.

H. H. Watson and T. Freeman Epes, for the appellees.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

It is apparent from the above statement of facts that unless there is something to take this case out of the general rule operating on the subject, if it were conceded that the plaintiff has proved title originally in himself to the land he claims to own (which is controverted and upon this question we do not find it necessary to pass), since the injury of which he complains arose from the flooding of his lands by reason of the dam above mentioned—a permanent structure—the cause of action for such injury arose at the time of the first commencement of the injury following the original erection of the dam and the right of action for all

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such injury, past, present and future was barred by the statute of limitations after the expiration of five years thereafter. (*Norfolk County Water Co. v. Etheridge*, 120 Va. 379, 91 S. E. 133.) So that when the land claimed to be owned by plaintiff was in the hands of his predecessors in title, over a century ago, as well as since, and while it has been in his own hands, all right of action for all injury aforesaid has been barred many times over by the statute of limitations; unless, as above suggested, there is something to take the case out of the operation of such statute. The plaintiff relies upon the milling acts above referred to to do this. He relies upon the forfeiture penalty of such acts as they are contained in section 1356 of the Code of Virginia 1887 which provides that “* * * if such mill * * * be at any time rendered unfit for use and the rebuilding or repair thereof shall not within two years from the time of such * * * unfitness, be commenced * * * the title to the land so circumstanced shall revert to the former owner, his heirs or assigns and the leave so granted shall then be in force no longer” * * *, to give the plaintiff a right of action which the bill seeks to protect by the injunction prayed for.

The milling act forfeiture provision aforesaid as contained in the 1887 Code of Va. is not retroactive in its form or effect. The same is true of all the preceding milling acts. Hence, if it were considered that the dam in the instant case was built under the milling acts (which fact is controverted and is unnecessary for us to decide) the question of whether the forfeiture provision aforesaid, relied on by the plaintiff, is applicable to the instant case, must be decided by reference to the milling act in force when such dam was built.

Now, as we have seen above, the milling act in force when the dam in the instant case was built, was the February, 1745, statute. The statute provided no forfeiture penalty whatever. Therefore, if it were conceded that the said dam

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was established or built under such milling act, there is nothing therein to take the case out of the operation of the statute of limitations aforesaid, and the plaintiff is left without any standing in court.

If the dam in the instant case could be considered as having been established or built under a milling act at a later date than the act which was in force from 1745 to October, 1785, even as late as 1811, just prior to its coming into the ownership of Francis Fitzgerald, Sr., or at any date between the enactment of the October, 1785, milling act and September 2, 1811, the forfeiture penalty provision of the last named act would govern the case. That provision, as we have above seen, extended only to the forfeiture of the one acre of land condemned for the abutment of one end of the dam to rest upon. As we have seen, from the statement of facts above, the predecessors in title of the defendant at that time owned the land on both sides of the stream on which the dam was built—as is uncontroverted before us—so that there could have been no condemnation of such one acre of land, and hence no later forfeiture of it, under the milling act of October, 1785.

It was not until the passage of the March 2, 1819, milling act that the further forfeiture penalty provision was enacted that, “* * * the leave granted by the court to erect any such mill * * * or dam shall cease and be void.” This was not retroactive in its purport or effect, as aforesaid. And this was long after the dam in the instant case was erected, as appears beyond all question from the record.

What has been said above proceeds upon the consideration of this cause as if the dam in question was established under the milling acts as aforesaid. The case may be considered from another point of view. The preponderance of the evidence in the cause fails to show that such dam was established under any of such acts. Hence, upon this ground also, the plaintiff has failed in establishing his right to rely upon such acts or any of them to take this case out of the operation of the statute of limitations aforesaid.

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Therefore, without considering the many other interesting and important questions in the case, for the reason stated above, we are of opinion that there was error in the decree complained of for which it must be reversed, and this court will enter such decree as the court below should have entered dismissing the plaintiff's bill.

Reversed.

Hightville.

**NORFOLK HOSIERY AND UNDERWEAR MILLS COMPANY V.
WESTHEIMER.**

June 14, 1917.

Absent, Burks, J.*

1. **MASTER AND SERVANT—Holding Over—Terms of Employment.**—In case of a contract of employment by the year, to be performed within the year, arising from a holding over and a continuance of a preceding employment by the year, without any notice either from employer to employee, or from the latter to the former, before the beginning of the new employment, of any proposed change in the terms of the preceding employment, the new contract of employment is implied in law to be on the same terms as the preceding employment.
2. **MASTER AND SERVANT—Holding Over—Terms of Employment.**—In such a case, the servant having furnished a valuable consideration to bind such new contract of employment by entering upon the performance thereof, the master could not thereafter change any of the terms without the assent of the servant, that is, without a meeting of the minds of the servant and master on a different contract.
3. **APPEAL AND ERROR—Conclusiveness of Verdict—Conflicting Evidence.**—Where the jury has decided a question of fact upon conflicting evidence, their verdict is conclusive.
4. **RECEIPT—"In Full."**—Where a servant had endorsed and used a check of his master, containing the entry on its face "in full to July 1, 1915," this constitutes *prima facie* evidence that such payment was in full of the servant's salary to July 1, 1915. But it was *prima facie* evidence only of such fact. The servant was at liberty, notwithstanding his acceptance and use of such check, to prove the correct status of the account between him and his master. The acceptance and use of such check merely placed the burden of proof upon the servant.
5. **ESTOPPEL—Master and Servant—Acceptance by Servant of Remittance Statements.**—The acceptance by a servant of payments made him by his master, accompanied by the statements of account contained in remittance statements, does

*Case submitted before Judge Burks took his seat.

Statement.

not estop him from drawing a larger salary per month than that shown to be due him by the remittance statements, unless the master was misled thereby to its prejudice, in that it was thus led to continue the employment of plaintiff beyond the term it was legally bound to continue it.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Affirmed.

STATEMENT OF FACTS BY SIMS, J.

The defendant in error, plaintiff in the court below, who will be hereinafter referred to as "plaintiff", was for ten or eleven years in the employment of the plaintiff in error, defendant in the court below, who will be hereinafter referred to as "defendant", as a travelling salesman. The employment during all this time was by the year, from January 1st to December 31st inclusive. For the year next preceding January 1, 1915, the guaranteed salary of the plaintiff was \$200.00 per month and expenses, and there was a contingent salary in addition, which was contingent upon 5% of his net sales exceeding such guaranteed salary. The contingent salary in excess of \$2,400.00 guaranteed salary per year is immaterial to the case before us.

There is no conflict in the testimony that the same employment of plaintiff was continued for the year January 1, to December 31, 1915, by the year. There is conflict, however, in the testimony with respect to the agreed salary he was to receive. There were two partners of the firm of defendant manufacturers, J. B. Hecht and Morton Hecht. The plaintiff testified that nothing was said to him by J. B. Hecht, on the subject of plaintiff's employment for 1915, prior to March, 1915; that in December, 1914, Morton Hecht, referring to plaintiff's employment for 1915, told him, (to use the words of the latter) "that he was not uneasy about me," (referring to his capacity as a salesman) "that I

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should keep on like I had been keeping on * * * no matter what the conditions should be * * * and I thought it was settled;" that this was all that passed between the plaintiff and the defendant prior to 1915 on the subject of the employment by the latter for the year 1915; and that plaintiff accordingly continued his said work for defendant for the year 1915.

As we must consider the testimony as if upon demurrer to the evidence by defendant, we must regard the fact as being that the plaintiff continued in the employment of the defendant for the year 1915 under an implied contract upon the same terms as to salary as fixed by the employment for the year 1914.

The defendant, however, further claims that the plaintiff in March, 1915, consented to a change in the amount of his guaranteed salary from \$200.00 per month to \$150.00 per month for the remainder of the year 1915, namely from March 1 to December 31, 1915. There is a direct conflict in the evidence as to this. Plaintiff positively denies such consent in his testimony. The testimony for defendant is equally positive that such consent was given by plaintiff. As the testimony has to be considered by us we must regard the fact to be that the plaintiff did not give such consent.

The remaining material facts in the case are that as a rule the plaintiff did not in prior years or during the year 1915 draw his guaranteed salary each month, but from time to time as he chose, he would request payments to be made him, which were always made per his request, and that he had never overdrawn such salary. That \$1,700.00 was paid plaintiff in 1915 evidenced by checks of defendant for following amounts and of the following dates: 1915, February 25th, \$200.00; March 10th, \$200.00; June 28th, \$200.00; June 28th, \$200.00, (two checks same date); July 9th, \$200.00; August 20th, \$200.00; November 18th, \$500.00, leaving \$700.00 balance unpaid of the \$2,400.00 guaranteed salary aforesaid. All of these checks were payable to plaintiff except one, namely, one of those dated June 28th, which

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was payable to "cash." This was done because plaintiff was then sick in a hospital and Morton Hecht in person took the cash therefor to the plaintiff on June 30th, and handed him same and the other check for \$200.00 of date June 28th, making \$400.00 paid plaintiff June 30th, evidenced by said two checks of June 28th.

The check of date July 9th contained this entry on the face of it "in full to July 1, 1915." It was in full of plaintiff's guaranteed salary if that was only at the rate of \$150.00 per month from and after March 1, 1915, but lacked \$200.00 of being in full of it, if it was at the rate of \$200.00 per month from and after March 1, 1915.

This was the only check in or on which appeared any entry as to the status of the account between plaintiff and defendant.

However, remittance statements were sent by mail or handed by defendant to plaintiff, with every check, except perhaps that payable to "cash." There are only three of such statements in the record, concerning the salary after March 1, 1915, dated respectively July 9, August 20 and November 18, 1915. The material portions of these statements are as follows:

July 9th Statement.

"Salary a/c of June to July 1st.....\$200.00"

"No receipt required. File this for reference."

(This, it will be observed, accords with plaintiff's claim as to amount of salary per month, but was in fact the salary for May, to be in accord with plaintiff's claim, and not for June; and was in full of salary to July 1st, in accordance with the claim of defendant, as stated on face of the check aforesaid of this date.)

Statement.

August 20th Statement.

"Salary a/c—July	\$150.00
August	50.00
	<hr/>
	\$200.00"

"No receipt required. File this for reference."

November 18th Statement.

"Bal. on salary in full to November 1, 1915.....	\$400.00
"\$100.00 on November salary	100.00
	<hr/>
	\$500.00"

"No receipt required. File this for reference."

Plaintiff testified that he did not notice the entry afore-said on the face of the July 9th check and that he never noticed or paid any attention to any remittance statement sent or handed him with checks for his guaranteed salary.

On December 31, 1915, defendant rendered plaintiff a statement showing \$200.00 balance due him according to defendant's position as to the salary of plaintiff from and after March 1, 1915, which was correct according to that position. Plaintiff claimed that \$700.00 was the balance due him, which was correct according to his said position on the subject, declined to accept the \$200.00 balance and instituted this suit. The suit resulted in a verdict in the court below for \$700.00 in favor of plaintiff. Thereupon the defendant moved the court to set aside such verdict as contrary to the law and the evidence and grant it a new trial, which motion the court overruled and entered judgment against defendant in accordance with said verdict for \$700.00 and costs. This action of the court is before us for review.

Loyal, Taylor & White, for the plaintiff in error.

S. M. Brandt, for the defendant in error.

Opinion.

SIMS, J., after making the foregoing statement, delivered the opinion of the court .

1. This is a case of a contract of employment by the year, to be performed within the year. It being a holding over and a continuance of a preceding employment by the year, without any notice either from employer to employee, or from the latter to the former, before the beginning of the new employment, of any proposed change in the terms of the preceding employment, the contract of such new employment is implied in law to have been of the same terms as those of the preceding employment—that is to say, the amount of the guaranteed salary of plaintiff for the year 1915 was \$2,400.00 (*Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763).

The plaintiff having furnished a valuable consideration to bind such new contract of employment by entering upon the performance thereof, the defendant could not thereafter change any of said terms without the assent of the plaintiff, that is, without a meeting of the minds of the plaintiff and defendant on a different contract. Whether there was such assent and different later contract the jury have decided in the negative on conflicting evidence, as above stated, and their verdict under the well settled rule on the subject is conclusive upon us.

2. As to the effect of the endorsement and use by plaintiff of the check of July 9, 1915, containing the entry on its face "in full to July 1, 1915," which is urged as barring the plaintiff's right of recovery.

This was *prima facie* evidence that such payment was in full of plaintiff's salary to July 1, 1915.

But it was *prima facie* evidence only of such fact. Plaintiff was at liberty, notwithstanding his acceptance and use of such check, to prove the correct status of the account between him and the defendant. The acceptance and use of such check merely placed this burden of proof upon the

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plaintiff. He has sustained such burden in the instant case by his testimony showing what the contract of employment of him by defendant was for the year 1915, and how much it in fact paid him thereon; which testimony the jury have accepted as true, and which showed that the entry, "in full to July 1, 1915," on said check was incorrect.

3. Another position urged by counsel for defendant is that the acceptance by the plaintiff of the payments made him accompanied by the statements of account contained in the remittance statements, gave to these statements the effect of making them *prima facie* evidence of their correctness; and a number of cases of *employment by the month*, where the employee signed receipt in full for the monthly salary, are cited as sustaining such position.

It is unnecessary for us to consider whether this position is well taken, for the reason that, if the acceptance of the payments made him were considered as making the said statements *prima facie* evidence of their correctness, the testimony of the plaintiff was ample to rebut and overturn such *prima facie* case; and the credibility of such testimony was for the jury.

4. The remaining position urged in bar of the plaintiff's recovery is, that he is estopped from drawing a larger salary per month than that shown to be due him by said remittance statements, by his acceptance of the payments made him accompanied by such statements.

This position could be maintained only in the event that the defendant was misled thereby to its prejudice, in that it was thus led to continue the employment of plaintiff beyond the term it was legally bound to continue it.

We have seen that this was not true in the case at bar, hence this position is untenable.

The following cases are relied on as sustaining such position.

Philadelphia & B. C. R. Co. v. United States, 103 U. S. 703, 26 L. Ed. 454. In that case a railroad company con-

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tracted to carry the mails over a route which included another railroad, and the latter road performed part of the service, and brought an action against the Government for such service: *Held*: That having stood by contentedly and seen the money, which it now claims, paid to the other company and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover and thus make the Government pay twice."

Clearly a very different case from that at bar.

In *Moller v. J. L. Gates Land Co.*, 119 Wis. 548, 97 N. W. 174, there had never been an employment by the year, but for an *indeterminate period*. The employee rendered statements from time to time during his employment in all respects in accordance with his theory that under the contract he was entitled to a salary of \$100.00 per month and expenses, and the employer for eighteen months failed to object to the employee's view of the contract, "while encouraging him to continue in the performance of his duties under it." *Held*: The employer was estopped from changing his attitude on the contract to the employee's prejudice.

In the case last cited the period of employment was uncertain. In the case at bar the period was certain. The distinction between the cases is manifest.

In *Taylor v. Butters, etc., Co.*, 103 Mich. 1, 61 N. W. 5, there was a sale of slabs, edgings, etc., trimmed from lumber cut at plaintiff's mill at a specified price per cord—the contract not specifying the length of the material, but that it was to be piled in condition for measurement on scows alongside defendant's mill dock and then measured. The defendant was to pay monthly for the material received; that *both parties* measured it; and that defendant sent statements monthly of the measurements and a check for the amount thereby shown to be due (per syllabus). *Held*: "That the court properly charged that if plaintiff received such statements and checks without objection and remained

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silent for any considerable time, he would be estopped from afterwards questioning the measurements, in the absence of fraud and mutual mistake."

This decision rests on the principle that the parties were bound by a mutual adjustment of matters of account between them and that there was an account stated between them embodying such result—an accord and satisfaction—and has no bearing upon the case at bar.

For the foregoing reasons we find no error in the judgment complained of and it will be affirmed.

Affirmed.

Syllabus.

Mythenville.

NORFOLK SOUTHERN RAILROAD COMPANY V. WHITEHEAD.

June 14, 1917.

Absent, Burks, J.

1. **CROSSINGS—Contributory Negligence—Last Clear Chance.**—In an action for damages for injury to an automobile of plaintiff, by an express electric train of defendant, at a public road crossing, it appeared that when the train was about 1000 feet away from the crossing the motorman saw the plaintiff's automobile stop upon the track and could easily have stopped before reaching the crossing. There were superadded facts, plainly observable by the motorman, showing that the plaintiff was preoccupied and unconscious of his imminent peril.

Held: That a verdict of the jury in favor of plaintiff must be sustained under the well-settled doctrine of the last clear chance.

2. **APPEAL AND ERROR—Instructions—Last Clear Chance—Harmless Error.**—In an action for injuries to an automobile by defendant's train at a public crossing, the court instructed the jury that if they believed from the evidence that the plaintiff was guilty of contributory negligence, yet if they believed that the "defendant company knew of the plaintiff's danger, or by the exercise of ordinary care should have known of plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so." It was objected to this instruction that it imposed an absolute and unqualified duty upon the defendant to stop its train, and that it should have been qualified by the insertion of the words "by the exercise of ordinary care," or words of similar import, after the words "avoided the accident."

Held: That as a legal proposition this position is correct, and the instruction should have been qualified as suggested. But upon the facts of the case it plainly appeared that this error was not prejudicial to the defendant, since with the train about 1000 feet away from the crossing when the motorman saw the plaintiff's automobile stop upon the track, the jury must have found that by the exercise of ordinary care the defendant could have stopped its train in time to have avoided the accident.

Statement.

3. **CROSSINGS—Proximate Cause—Last Clear Chance.**—In an action for injuries to plaintiff's automobile by the train of defendant at a public crossing, where the doctrine of the last clear chance was applicable, a number of other questions were raised with respect to the negligence of defendant and the contributory negligence of the plaintiff in certain particulars. *Held:* That if both defendant and plaintiff were negligent in such matters respectively, it was manifest that none of them were the proximate cause of the injury, since the doctrine of the last clear chance was applicable.

Error to a judgment of the Circuit Court of Princess Anne county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

The plaintiff in error was the defendant in the court below, hereinafter designated "defendant"; and the defendant in error was plaintiff in the court below, hereinafter designated "plaintiff."

This is a case of injury to an automobile of plaintiff by an express electric train of defendant at a public road crossing.

There was a trial by jury, a verdict for plaintiff in the court below, which the latter refused to set aside and entered judgment against defendant accordingly. Of this judgment the defendant complains, and assigns as error the action of said court in granting and refusing certain instructions and refusing to set aside the verdict as contrary to the law and the evidence.

Ascertaining the material facts, under the rule applicable in this court in such case, bearing on the only question we find it necessary for us to pass upon, they are as follows:

Statement.

THE FACTS.

The accident occurred in broad daylight at a station and public road crossing of defendant's railway in a small country village. The railway line runs east and west. The train which collided with the automobile was going east at a speed of about forty-five miles an hour as it approached the crossing until it was about 90 or 120 feet from it. The railway line was perfectly straight for several miles, west and east of the crossing, and the crossing and plaintiff's automobile, as it came upon and stopped on the railway track at the crossing, were plainly visible to the motorman of the train when the latter was 1000 feet or more away, if the train was that distance away at such time. Plaintiff, with his little girl beside him in his automobile, traveling along the public road from the north going in a southerly direction, approached very near the crossing, moving very slowly to avoid running up on a Mrs. Gimlett and her little boy, who were just ahead of him going in the same direction. Mrs. Gimlett was walking on one side of the road along a pathway, her little boy alternately darting out into the road and then back, which, after he had looked east along the railway line, engaged the plaintiff's attention until the instant he was about to go upon the railway track, when he looked west and saw the train coming. The manifest evidence of this preoccupation of the plaintiff and unconsciousness of his imminent peril was in plain view of the motorman on the approaching train. Mrs. Gimlett testified that at this instant she heard repeated blasts of the train whistle (the emergency signal as the jury were warranted in believing it); that she did not notice the train until then; that it was then west of or at Mr. Kelly's house—not nearer she thought—(Mr. Kelly's house was about 800 feet west of the crossing, 200 feet east of the whistle post, which was 1000 feet west of the crossing); that witness was then just crossing over the railway track,

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her father (who was also with her) was coming behind her, between the rails of the track; that she looked back for her father and saw the plaintiff's automobile very close to her (his automobile had come to a standstill—engine stopped or gone dead—with the front wheels over the north rail of the track standing on the crossing, as plaintiff testified) and he "was changing" his child over. Taking up the narrative at the instant his automobile stopped, the plaintiff testified as follows:

"* * * and there I was * * * and the next thing I realized if he did not stop his car I was going to be struck, and I took the little girl from the right hand side and started to pass her on the left hand side, and I thought 'I will put her on the ground and tell her to run towards Mr. Burgess,' and then I thought that she might be bewildered and stand there, and I realized that when the car struck that was the way my car would be knocked, and I took her up and passed her back, and put her on the running board on the right hand side, and was in the act of putting my foot on the gear, so if she struck the car would be clear of her, and the way he was coming I seen he was bound to hit it, and I put my hand on the child and shoved her off the car, and the crash came, and the car went 180 feet after he struck me down the track."

In regard to the distance the train was away the instant he noticed it when his automobile went on the track, the plaintiff testified as follows:

"It is really hard for me to say how far the car was up the track when I first noticed it. I had to judge by this, and measured the distance of 500 feet to an object that was between me and the car, and the car was on the other side of that object, which was 500 feet when I first seen it, and I measured another object after I had stopped, and that was 390 feet, and the car was still on the other side of that when I stopped. How much, I could not say."

Statement.

From Mr. Kelly's testimony the jury were warranted in finding that the emergency signal, of repeated sounding on the whistle, began when the train was west of his house, above the whistle post, or 1000 feet away from the crossing according to the plaintiff's testimony. It is true Mr. Kelly stated this distance as about 600 feet, but there being a conflict here, the plaintiff's statement on the subject must be taken by us to be the correct statement.

The material testimony for defendant, not in conflict with that for plaintiff, was as follows:

If the train had been going at a speed of 40 miles an hour it could have been stopped by the exercise of ordinary care to do so in 400 to 500 feet.

There were three signals blown by the whistle of the train; (1) one long whistle for the station, which was blown soon after they "left the woods," which was west of the whistle post, over 1000 feet from the crossing; (2) a crossing signal (what number of blasts of whistle not stated) which was blown about opposite the whistle post, or about 1000 feet away from the crossing, followed immediately, or almost immediately, by the emergency signal of repeated short blasts of the whistle.

The conductor of the train, a witness for the defendant, testified as to the sequence of signals and as to when the emergency brakes were put on, as follows:

"Well, my attention was attracted to the accident by the whistle blowing. The motorman blew the regular station blow, and then immediately after he blew the crossing blow I heard him blow several short whistles. That is the danger signal, precaution signal. I was sitting on the second or third seat from the rear of the coach, and I looked out, and when I looked out I saw the front wheels of the machine standing on the track, of the first rail from the left hand side."

Q. "Then what happened?"

Statement.

A. "Well, the motorman reduced the speed of his car as soon as he began to give the danger signals, and the next thing happened the machine was struck."

The motorman of the train, a witness for the defendant, testifies that he saw the plaintiff when he came with his automobile "up on the track and stopped. * * * I seen him stop on the track and I tried to stop the train * * * I did everything I could to stop it * * * I threw the brakes in emergency as I usually do if I see anything on the track, and tried to make a quick stop."

The motorman, however, differs from other witness for defendant, as to when he put on the emergency brakes with reference to the sequence of events in respect to the giving of signals, and testified that he saw the plaintiff stop on the track before he blew the emergency signal. That when he saw him, (to use the motorman's own language) "I thought I could do more with the brakes than I could with the whistle," and first put on the brakes and then blew the emergency signal.

SUMMARY OF THE FACTS.

The jury were therefore warranted in concluding from the evidence that the motorman saw the plaintiff's automobile stop on the track when the train was about 1000 feet away from the crossing, before the emergency whistle was blown, and that thereafter in the exercise of ordinary care he could have easily stopped the train before it reached the automobile on the crossing.

Jas. G. Martin, for the plaintiff in error.

J. Edward Cole and *Fred C. Abbott*, for the defendant in error.

Opinion.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

As it appears from the foregoing statement of facts that the verdict of the jury must be sustained under the well-settled doctrine of the "last clear chance," it will be necessary for us to consider but one instruction of the court below, which bears upon the duty of the defendant with respect to stopping its train under the circumstances of this case—that is, instruction "E" which was as follows:

"The court instructs the jury that even though they may believe from the evidence that the plaintiff in this case was guilty of contributory negligence, yet if they further believe from the evidence that the defendant company knew of the plaintiff's danger or by the exercise of ordinary care should have known of the plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so, and if they believe from the evidence that the said defendant company failed to exercise this duty it is liable and your verdict should be for the plaintiff."

The objection urged to this instruction is that it imposes an absolute and unqualified duty upon the defendant to stop its train, and that it should have been qualified by the insertion of the words "by the exercise of ordinary care," or words of similar import, after the words "avoided the accident" in the instruction.

As a legal proposition this position is correct. The instruction as given should have been qualified as suggested, and not to do so was error. But upon the facts of the case as we must regard them to be, it plainly appears that this was error not prejudicial to the defendant, since with the train about 1000 feet away from the crossing when the motorman saw the plaintiff's automobile stop upon the track, the jury must have found that by the exercise of ordinary care the defendant could have stopped its train

Opinion.

in time to have avoided the accident. Hence, under the rule on the subject too well settled to need citation of authority, this was harmless error.

A number of questions are raised in the case with respect to whether the defendant was guilty of negligence in maintaining its crossing of the public road in proper condition; whether there was any evidence of an improper crossing to go to the jury; what was the degree of care required of defendant with regard to maintaining the crossing in proper condition; whether it was negligent in not sounding its whistle properly or sounding it too far away from the crossing; whether there was any evidence to go to the jury of the non-sounding of the whistle properly; whether the plaintiff was guilty of contributory negligence so as to bar his recovery in going upon the track without having looked and listened in such a manner as to make the looking and listening effective; whether in the instant case the latter should have stopped to make his looking and listening effective, etc.; but if both defendant and plaintiff were negligent in such matters, respectively, it is manifest that none of them in the instant case was the proximate cause of the injury. The doctrine of the last clear chance being applicable as aforesaid, what has been said above disposes of the case.

Therefore, for the reasons heretofore stated, we find no error in the judgment complained of and it will be affirmed.

Affirmed.

Statement.

Mytherville.

PEDEN V. PEDEN'S ADMINISTRATOR.

June 14, 1917.

Absent, Burks, J.*

1. **WITNESSES—Privileged Communications—Statements to Tax Officers.**—A person's own statement of his own taxable property, to the proper official, is not a privileged communication at common law. The State may make such communications privileged by express statute; otherwise, they are not privileged.
2. **WITNESSES—Privileged Communications—Statements to Tax Officers.**—In an action by the administrator of defendant's mother against defendant to recover the possession of certain negotiable notes, it was material to ascertain whether defendant came into the possession and ownership of them before the death of his mother.

Held: That oral statements, not under oath, by defendant to the examiner of records of his circuit and the commissioner of revenue of his city, that the notes in question were not his property on the first of February preceding his mother's death, and did not come into his possession or become his property until after the death of his mother, were not privileged communications at common law, nor were they made so by the act of 1915, p. 158, providing that the answers required under oath under that act should not be disclosed unless called for by a court of record, or by the State advisory board, or a local board of review. Under the present statute, Acts 1916, p. 420, such statements would be privileged.

Error to a judgment of the Corporation Court of the city of Fredericksburg, in an action of detinue. Judgment for plaintiff. Defendant assigns error.

Affirmed.

*Case submitted before Judge Burks took his seat.

Statement.

STATEMENT OF THE CASE AND THE FACTS BY SIMS, J.

This is an action to recover the possession of certain negotiable notes by the defendant in error (hereinafter designated "plaintiff") against the plaintiff in error (hereinafter designated "defendant"). The case resulted in a verdict and judgment for the plaintiff in the court below.

The question at issue before the trial court was whether the choses in action sued for were the property of the plaintiff's intestate or of her son, the defendant, and it was material to ascertain whether the latter came into the possession and ownership of them before the death of his mother.

Upon that issue, the court below, over the objection of the defendant, permitted the examiner of records of defendant's circuit and the commissioner of the revenue of defendant's city, to testify as to certain statements made to them by the defendant, to the effect that the notes in question were not his property on the first of February preceding his mother's death and did not come into his possession, or become his property, until after the death of his mother, which occurred the latter part of such February.

The statements referred to were made by the defendant to said tax officials on the subject of the listing of said choses in action for taxation.

The statements aforesaid were not given by the defendant under oath. They were not given before the local board of review; they were not given in a list or in interrogatories in writing of and with respect to bonds, notes and other evidence of debt, signed and sworn to, required by law to be furnished by tax payers to commissioners of the revenue (Acts 1915, p. 98), nor in any answer under oath required by or before the local board of review (Acts 1915, p. 158).

Statement.

The statements aforesaid made by defendant to the examiner of records were made about the month of September of the year in question, under the following circumstances, as testified to by the examiner:

"* * * I got some information somewhere that there was a suit pending in which it was claimed that Mr. Peden was the owner of \$3,000 deed of trust notes, that came from his mother. I understood that the claim was that they had become his property prior to February, 1915. I asked Mr. Peden with reference to that and he stated that the notes were not his on the first of February; that they did not become his property until his mother's death, which was sometime the latter part of February. I was surprised at that and asked him again, and told him I wanted to be certain about it; that if they were his mother's notes, I would report them in my fiduciary report, and if they were his, they would be charged to him; that that would be the only difference, and he repeated his statement that they were not his on the first of February, 1915. * * *"

"Was Mr. Peden answering any interrogatory at that time?"

"No, sir, Mr. Peden did not give in any written interrogatory last year of intangible personal property to the commissioner of revenue. The law requires the commissioner of revenue to turn over all the interrogatories which he receives to me after a certain time. He turned over the interrogatories to me, and among them I found an income report, but no report of intangible property from Mr. Peden."

By Mr. Butzner:

"There was no contest over Mr. Peden's return before the board of review as to intangibles? * * *"

"None at all."

Statement.

The statements aforesaid made by defendant to the commissioner of revenue were made on October 2nd of the year in question, and as per testimony of the latter were as follows:

"Mr. Peden came into my office on this day, October second, and handed me a list of bonds for entry. I looked at them and told him that this sheet handed me by the examiner of records was completed, and I did not know exactly what to do with the bonds, and would have to get authority, direction, as to where they would be placed, if at all, in this record, from the fact that Mr. Peden, as he told me, came into possession of these bonds after the first day of February, 1915. I looked at them and took no note of them other than the addition of the bonds for the entire amount, which was \$3,000. There were two sheets on which these bonds were listed. * * *

"I had no authority to take them at all, after the first day of February, and I told him if they came in his possession after the first day of February I had no authority to tax them, but he said he wished them listed for taxation under his name. * * *

"My impression is that Mr. Peden said that they were in his mother's possession, somewhere in the house, if I mistake not in a trunk, and after her death he took possession of them, and wanted to list them for taxation."

The sheets of paper referred to by the last named witness were not the list required by statute above referred to and were not under oath.

The statute on the subject of the lists or interrogatories above referred to (Acts 1915, p. 98) so far as material, is as follows:

"Section 8. Classification under schedule C shall be as follows:

"First: Bonds, notes and other evidences of debt," etc.

"The commissioner shall require each person * * * residing in his city * * * to make out and deliver to said com-

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missioner a list in detail * * * of all bonds, notes and other evidences of debt owing to such person in excess of one hundred dollars * * * This list shall be signed and sworn to by the taxpayer * * *

At the time the communications in question were made to him, the duty of the examiner of records with respect to the assessment of choses in action for taxation, so far as material, as provided by said statute (Acts 1915, p. 157) were as follows:

"* * * it shall be the duty of said examiner * * * to assist the said local boards of review in the examination of * * * the returns of taxpayers of all such intangible personal property * * * to examine the returns aforesaid and the records, both State and Federal, with a view to ascertaining and reporting for taxation the values to be extended by said commissioners of the revenue on all intangible personal property * * * liable to taxation under the laws of this State. As soon as such examinations and taxations are made by the examiner of records, he shall make report thereof to said local board of review * * *" It is also provided in this statute that each examiner of records shall receive a commission upon "valuations added as a result of his investigations and examinations of the returns of intangible personal property * * * of taxpayers not returned by them."

At the time of the trial in the court below, "the answers required under oath" consisted of those of the taxpayer in the list or interrogatories required by law as above stated, and such answers as he might give under oath upon being summoned by the local board of review before it when there interrogated. The examiner of records had the statutory power to have the taxpayer brought before the local board of review for examination and there to examine the taxpayer under oath. The statute on this subject (Acts 1915, p. 158) is as follows:

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"The local board of review shall have authority to summon taxpayers, or their agents or any other person having information on the subject before them, and require them to answer under oath all questions. * * * Upon the request of the examiner of records the said local board of review, or its chairman, shall summon any such taxpayer before it to answer *on oath* such questions as may be propounded by said board or examiner of records."

At the time that this case was tried in the court below the statutory enactment, embodying the policy of this State on the subject of what statements of taxpayers should be privileged was contained in said Acts of Assembly, 1915, p. 158, and was as follows:

"The answers required under oath of the person, firm, corporation, agents or witnesses, shall not be disclosed unless called for by a court of record, or by said State advisory board, or any local board of review."

Subsequently to the trial of this case in the court below, the said statute embodying the policy of this State on the subject of privileged statements of taxpayers was changed, and enlarged in its scope (Acts 1916, p. 420), and is as follows:

"The information procured by local boards of review and examiners of records under this act shall be regarded as confidential, except for the purposes of assessment, and shall not be disclosed except to the State tax board or to some other local board of review or to officers charged with the assessment and collection of taxes, or to a court of record upon its order."

The latter statute was not in force when the court below admitted the testimony in question.

F. M. Chichester, G. B. Wallace and R. E. Byrd, for the plaintiff in error.

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C. O'Connor Goolrick and *W. W. Butzner*, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

It is admitted in argument that if the statute of 1916 last above quoted had been in force, at the time of the trial of this case in the court below, the testimony admitted over the objection of the defendant would have been privileged and inadmissible without order of court first obtained in a proper proceeding therefor dispensing with its privileged character. Such statute not being then in force, however, the question we have to determine is—

1. Were the communications in question privileged, (a) at common law, or (b) under the statute of 1915 above quoted?

Counsel for defendant contend that such testimony is privileged at common law and under said statute of 1915.

It is clear that the communications in question do not come within the express provisions of the statute of 1915; but it is contended that they come within their spirit and meaning—within the consideration of public policy underlying and sought to be enforced by such statute. As this seems to be a question of first impression in this State, a consideration of the subject on principle and in the light of the authorities, developing to some extent the fundamental distinctions thereby made, would seem to be desirable.

We will consider first the following authorities, most of them cited and relied on by counsel for defendant:

Hennessy v. Wright, 9 Eng. R. C. 570, was an action of libel by the Governor of a Colony against the defendant, because of a statement made by the latter in a newspaper. On application for discovery by defendant the plaintiff objected to producing certain documents on the ground that he held

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them in his capacity as Governor and that the Secretary of State for the colonies had directed the Governor not to produce or disclose such documents and to object to their production on the ground of the interest of the State and the public service.

The court in its opinion considered two classes of State documents privileged from discovery—

1. Where the publication of State documents may involve danger to the nation in the direction of involving it in war.

2. Where the publication of such documents may be injurious to servants of the Crown as individuals, which would end all freedom of official communication, etc.

Of the latter class, the privileged communications of client to solicitor, and of an informer to a revenue officer, are mentioned.

As to State documents, what is the public policy, it is said, may turn to some extent on acts of Parliament on the subject.

Discovery was denied on the ground that the case fell within the first class above named.

Cole v. Andrews, 74 Minn. 93, 76 N. W. 962, was an action for malicious prosecution. *Held*: Defendant's communications to the county attorney, in the official capacity of the latter, for the purpose of having a prosecution of plaintiff for a public offense, were not privileged. That the relationship of attorney and client did not exist between defendant and the county attorney. Neither were the communications privileged under section 5662 of the Gen. St. 1894 of the State, providing that "a public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

The court, in its opinion, said: "In the first place, the communications to the county attorney were not made in confidence. Further, the defendant testified fully as to all the facts, first, before the grand jury, and next, on the trial

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of the indictment, and the prosecution has terminated. And lastly, the defendant has voluntarily disclosed in his answer in the case, that he did communicate the facts to the county attorney and he set up that fact as a defense. How the public interest would suffer or how it would be any breach of confidence towards the defendant to permit the county attorney to disclose what those communications were, is not apparent to us."

Thompson v. The German Valley R. Co., 22 N. J. Eq. 111, was a case of *subpoena duces tecum* to compel a Governor of New Jersey to appear and testify before an examiner of court, and to bring with him an engrossed copy of an act of Assembly. The process was directed to the Governor in his individual name and not as Governor. *Held*: He should have attended as a witness, but was entitled to withhold any paper or document in his possession, or any part of it, if in his opinion his official duty required him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. 1 Burr's Trial 182, 2 *Ibid.* 535-6.

State v. Hoben, 36 Utah 186, 102 Pac. 1000, was a case of prosecution for rape. The prosecutrix made certain communications to the district attorney. *Held*: Such communications came within the provisions of subdivision 2 of sec. 3114, Comp. Laws 1907, which is as follows:

"2. An attorney cannot without the consent of his client be examined as to any communications made by the client to him * * * in the course of professional employment."

The court did not decide whether it came within subdivision 5 of such section, which was as follows:

"A public officer cannot be examined as to any communication made to him in official confidence, when the public interests would suffer by the disclosure;" but further held that the privilege of the prosecutrix under sub-section 2 was waived by her first testifying to what she stated to the district attorney. The court said, as to sub-section 5 being applicable:

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"* * * this subdivision relates especially to matters pertaining to the affairs of the State or nation, or concerning State secrets or communications by informers to public officials. The evidence is excluded because it would prejudice the interests of the public and because public safety is best subserved by keeping out such evidence. Jones Ev. (2nd ed.), sec. 762; Elliott Ev., sec. 639; 4 Wigmore Ev., sec. 2367. It is indeed very doubtful if it was made to appear in what particular the public interest would suffer by the disclosure."

To the same effect, without statute, as above holding as to subsection 2, *State v. Brown*, 2 Marvel (Del.) 380, 36 Atl. 463.

King v. United States, 112 Fed. 988, 50 C. C. A. 647, was a case of trial on indictment of an officer of the United States for receiving a bribe from a contractor. The latter, a witness for the government, was asked on cross-examination several questions as to whether the Department of Justice had promised him immunity from prosecution if he would testify against the accused, etc. The rule laid down by Rosc. Cr. Ev. (Sharswood's Ed.) 185, that "Where a communication takes place between a counsel or an attorney and his client, or between government or some of its agents, such communication is privileged on the ground that, should it be suffered to be disclosed, the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy," was relied on by counsel for the government, and they also cited Steph. Dig. Ev., 7 Am. & Eng. Enc. Law, p. 102, and I Greene Ev. (15th ed.), sec. 250.

The court said that this objection rested on the ground that the questions were not permissible, "because they were directed towards the ascertainment of a State secret, which is privileged on grounds of public policy. * * * In this case we do not think there is any necessity to approve or disapprove of the proposition cited from Roscoe, nor to deter-

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mine how far the public policy which shuts the mouths of witnesses in regard to those secrets can be safely applied when it conflicts with the constitutional rights of every person tried in the courts of the United States to have a fair and impartial trial."

The court then held that, "the conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of State secrets, and when a witness so induced or influenced appears on the stand and testifies, he may be cross-examined as to any and all inducements made to him on the part of any one in connection with his evidence; * * *

Kessler v. Best (C. C.), 121 Fed. 439. *Held*: merely that documents which are part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents.

In re Lamberton (D. C.), 124 Fed. 446, holds that a collector or a deputy collector of internal revenue cannot be compelled to disclose as a witness, before the court or the grand jury, the names of persons in whose places of business special tax stamps are posted, or the places in which the same are posted; his information on the subject having been obtained in his official capacity and primarily from the records of his office, copies of which he is forbidden to furnish by the lawful regulations of the Treasury Department. In such cases there has been, in effect, an express statutory declaration of public policy.

In re Huttman (D. C.), 70 Fed. 699. *Held* (per syllabus): "Regulations made by the commissioner of internal revenue pursuant to statutory authority, with the approval of the Secretary of the Treasury, in respect to the assessment and collection of internal revenue, have the force of statutes * * *

"A deputy collector cannot be compelled to testify in a criminal proceeding in a State court, as to statements made

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to him by an applicant for a special retail liquor dealer's tax stamp, which statements were made for the purpose of being reduced to writing and embodied in the records of the internal revenue office. To divulge such statements would be to divulge the contents of the records themselves, which is forbidden by the internal revenue regulations."

To the same effect: *Stegall v. Thurman* (D. C.), 175 Fed. 813; *Boske & Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846.

In re Joseph Hargreaves, Limited (English Court of Appeals, Chy. Div.), 1 Ch. 347: The question was upon the propriety of the refusal of the court below to grant an order under section 115 of the companies act, 1862, to compel the surveyor of taxes to attend before the liquidator of the company for examination as a witness, and to produce balance sheets which had been given him by the company for the purpose of his assessment of income tax against it. The act left the matter of granting such an order discretionary with the court. There was a certificate by the board of inland revenue that in their opinion the production of the documents referred to "would be prejudicial to the public interest and service." The court of appeals declined to interfere with the action of the court below refusing to grant the order in question.

In *Bowman v. Montcalm, Judge*, 129 Mich. 608, 89 N. W. 334, it was held that tax lists which property owners are required to furnish the assessor cannot be used for any other purpose than that *limited by statute*, Comp. Laws, sec. 3846, which provides that no such lists "shall be used for any other purpose except the making of an assessment for taxes as herein provided, or for enforcing the provisions of this act." (Italics supplied.)

To same effect: *In re Reid* (U. S. Dist. Court, Mich.), 155 Fed. 933.

In *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736, the question was whether the defendants in an action

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of tort for conspiring to injure and damage plaintiff by preventing his importation of books, by representations to the Treasury Department of the United States that plaintiff intended to import books without payment of the lawful duty thereon, etc., could be compelled to testify they gave such information? *Held*: Defendants cannot be compelled to give testimony on such subjects. Mr. Justice Gray, in delivering the opinion of the court, said: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing his duty without fear of consequences, the law holds such information to be among the secrets of State and leaves the question of how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to the views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

The learned judge then proceeds to give a resume of the English authorities on the subject of information given to revenue officers touching matters falling within the discharge of their duties, going to the extent of clothing with secrecy the name of the informer, as well as all information given by him, unless waived by the State. The same is held with respect to information given military courts, boards of custom, the President of the United States by a military officer, Governors of States, unless waived by the representatives of government. Such waiver, in prosecutions by the

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government, can be made by the official or other person being introduced as a witness for the government, or by the President or Governor, etc., voluntarily testifying.

Judge Gray then says: "The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense" (*i. e.*, in such sense that courts of justice will not permit or compel their disclosure without the assent of government) "and cannot be disclosed without the permission of the Secretary of the Treasury."

The privileged character of communication between husband and wife and of client to attorney are also referred to by counsel, as illustrations of the public policy underlying the said statute of 1915. The latter communications fall within a different class from the communication with which we are concerned in the instant case. The former are private in their nature and are privileged because they fulfil certain fundamental conditions prescribed at common law. The communications in question, in the case before us, would, in their nature, concern the public, and would be privileged at common law only in the event that they fell within the category of State secrets and official documents. See authorities above cited, and 4 Wigmore on Ev., pp. 3185-3270 and 3320-3346. The able and exhaustive treatment of the subject by the learned author of the last named work renders it unnecessary for us to discuss it further in detail here.

In brief, the summary of the law, as applicable to the case before us is this: " * * * a person's own statement of his own taxable property * * * to the proper official * * * is not a privileged communication at common law." 4 Wigmore on Ev., sec. 2374, subsec. 4, p. 3334. The State may make such communications privileged by "express statute;" otherwise, they are not privileged. *Idem.*

Cogent reasons are urged by the learned writer last cited why the doctrine touching privileged communications should

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not be extended where "matters of fact in the possession of officials concerning solely the internal affairs of public business * * * material to be ascertained upon an issue in a court of justice," are in question. *Idem*, sec. 2375, pp. 3334, 3339, 3340-1-2-3.

Certainly, it is beyond the legitimate power of the courts to extend the doctrine under consideration. It is a subject peculiarly and solely for legislative action. The legislature of this State has now acted by "express statute" so as to render communications of the character involved in the instant case privileged; but it had not so acted when the question as to their character arose in the trial court. The statute of 1815 did not by its terms make such communications privileged. It is not in our power to extend its meaning beyond that plainly expressed in the act. The fact that the legislature itself, at a subsequent time, felt it necessary to change its terms in order to give the statute a different meaning and a broader scope, is conclusive to our minds of the correctness of the conclusion we have reached.

For the foregoing reasons, we find no error in the action of the court below or in the judgment complained of, and the same will be affirmed.

Affirmed.

Syllabus.

Mytherville.**SACHS AND OTHERS V. OWINGS.**

June 14, 1917.

Absent, Burks, J.

1. **VENDOR AND PURCHASER—*Sufficiency of Title.***—Where the vendor of real property, under an executory contract of sale, agreed to deliver to the vendee a good and sufficient deed for the property in question, with general warranty and covenants of title, the purchaser is entitled to require a marketable title to be conveyed to him by his vendor, but not a record title, nor one which an abstract of title would show to be good, or free of liens or encumbrances, nor one in fact free of liens or encumbrances.
2. **VENDOR AND PURCHASER—*Marketable Title—Time as Essence of Contract.***—A vendee, under a contract for a good and sufficient deed, with general warranty and covenants of title, is entitled to require from his vendor a conveyance of a marketable title on the day fixed by the contract for completing the contract, where the action is at law, as in the instant case; time always being considered of the essence of the contract where it is construed at law.
8. **VENDOR AND PURCHASER—*Time as Essence of Contract—Resort to Equity—Rescission by Vendee.***—If either party wishes time after the day fixed, for completing the contract, he must resort to a court of equity where, in proper cases, the rigid rule of the common law on this subject will be relaxed. The vendee under a contract for a good and sufficient deed, with general warranty and covenants of title may, at law, elect to rescind the contract, if his vendor cannot, on the day fixed for completing it, convey to him a marketable title, and in such case, as he is not in equity asking the enforcement of the contract and his vendor is in default already, the vendee is not required to tender payment to his vendor of any balance due of unpaid purchase money, or to do any further act himself in completion of the contract, such as tendering notes for deferred payments contracted for, or the like, which would in such case be superfluous.

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4. **VENDOR AND PURCHASER—*What Constitutes Marketable Title.***—A vendee who is entitled only to a marketable title, can only demand such title as a reasonably well-informed and intelligent purchaser, acting upon business principles, would be willing to accept.
5. **VENDOR AND PURCHASER—*Marketable Title—Liens.***—A vendee is entitled to receive a title free of judgment and tax liens, but a vendee cannot elect to rescind and treat a contract as rescinded on the ground that the title is not a marketable title because there are encumbrances on the land purchased, if they are of such character and amount that he can apply the unpaid purchase money to the removal of the encumbrances. This can be done where the amount of the encumbrance is definite, does not exceed the unpaid purchase money due, is presently payable (as was the case with a delinquent tax lien in the instant case), and its existence is not a matter of doubt or dispute, or the situation is not such with respect thereto as to expose the vendee to litigation on the subject.
6. **VENDOR AND PURCHASER—*Title—Judgment Liens Barred by Statute of Limitations.***—Judgment liens barred by the statute of limitations do not, even at law, render a title unmarketable, and though not barred by the statute where they are for definite amounts, and less than the purchase money due and unpaid would discharge, and are presently payable, they do not render the title unmarketable.
7. **VENDOR AND PURCHASER—*Marketable Title—Easement—Telephone Lines.***—Where an easement of a telephone company to maintain its telephone line erected along the margin of the land, which was the subject of an executory contract of sale, was visible upon the land at the time the contract was made, the purchaser is presumed to have taken into consideration the existence of this encumbrance in fixing upon the amount of the purchase money. And where such easement was not an injury, but a benefit to the market value of the land, it cannot be considered to be an encumbrance of which the vendee could complain.
8. **CONTRACT UNDER SEAL—*Oral Release.***—At law, the common-law rule that an executory contract under seal can be modified or abrogated only by an instrument of equal dignity, i. e., by one under seal, has not been relaxed. It is only in equity, where the distinctive equitable principles applicable in that forum may be invoked, that there has been a relaxation of such rule.
9. **VENDOR AND PURCHASER—*Rescission of Contract Under Seal by Parol.***—A mutual agreement to rescind an executory contract under seal for the sale of land, if executed by actual cancellation or destruction of the contract, operates to annul

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it. But a parol executory agreement to cancel the contract could not operate, at law, to release the obligations of the contract under seal.

Error to a judgment of the Hustings Court of the city of Petersburg, in an action at law by motion, in the nature of an action of assumpsit. Judgment for plaintiff. Defendants assign error.

Reversed.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is an action at law by motion, in the nature of an action of assumpsit, by the defendant in error, plaintiff in the court below (hereinafter designated "plaintiff"), against the plaintiffs in error (hereinafter designated "defendants"), to recover back the \$500 cash payment made by the former to the latter upon a contract of purchase of real estate, on two grounds: •

1. Because at the time fixed for completing the contract the defendants—the vendors—could not convey a marketable title; and

2. Because on the day before the time fixed for completing the contract the defendants—the vendors—released the plaintiff—the vendee—from the obligation of the contract in consideration of the mutual agreement of plaintiff and defendants to cancel the contract, and that for the same consideration the defendants promised and agreed to refund the said \$500 to the plaintiff.

The said contract was in writing and under seal.

The material portions of the contract are as follows:

"This Agreement of Sale, made and entered into, in duplicate, this 14th day of August, 1915, by and between Walter Sachs and Fannie Sachs, his wife, parties of the first part, and Irvin Owings, of Washington, D. C., * * * party of the second part;

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"Witnesseth, that for and in consideration of the mutual promises and agreements hereinafter set forth, and especially in consideration of the sum of five hundred dollars (\$500.00) cash in hand paid by the party of the second part to the parties of the first part, receipt whereof is hereby acknowledged, the said parties of the first part do hereby agree to sell to the said Irvin Owings, and the said Irvin Owings doth hereby agree to buy of the said Sachs all that certain tract of land," (here follows description of the land) "and the said terms and conditions of purchase of the said tract of land herein agreed to be sold by the said Sachs and bought by the said Owings are as follows, to-wit:"

"(1) Sixteen thousand dollars (\$16,000.00) is to be the amount paid by the said party of the second part to the parties of the first part, and of this sum five hundred dollars (\$500.00) has already been paid by the party of the second part to the parties of the first part to bind this bargain, and the remainder of the purchase price, or fifteen thousand, five hundred dollars (\$15,500.00) is to be paid on August 19, 1915, and upon the payment of the balance of the purchase price, the said parties of the first part agree to deliver to the said party of the second part a good and sufficient deed for the property hereinabove mentioned, with general warranty and covenants of title; but, in the event the payment of the remaining \$15,500.00 is not made on or before August 19, 1915, then the \$500.00 already paid on account of this transaction shall become forfeited by the party of the second part to the parties of the first part, and this agreement in all other respects shall be null and void.

"Witness the following signatures and seals.

(Signed)

WALTER SACHS, (SEAL)

FANNIE SACHS, (SEAL)

IRVIN OWINGS (SEAL)"

Statement.

There was a trial by jury in the court below. Both the plaintiff and defendant introduced testimony. There was a demurrer to the evidence of the defendants by the plaintiff, and a verdict of the jury in favor of the plaintiff, subject to such demurrer.

The demurrer to evidence was sustained by the trial court and judgment was entered by it in favor of the plaintiff against the defendants for said \$500.00, together with interest and costs, in accordance with said verdict.

There were other proceedings in the case, which however are immaterial in the view we take of it on the merits, and hence no reference thereto need be made by us.

On the merits of the case the following were the further material facts before the jury:

At the time fixed for completing the contract, to-wit, August 19, 1915, the defendants had a good and perfect title to said land, subject, however, to the following subsisting encumbrance and lien thereon:

1. An easement of the Petersburg Telephone Company to maintain its telephone line erected along the margin of said land next to and alongside of the Western Union Telegraph Company's telegraph line, which is located next to and along one side of such land.

2. Unpaid taxes for the year 1912, amounting to \$4.84, which amount was *presently payable*.

There were also three alleged judgments, but they appeared of record as barred by the statute of limitations, and (if not barred by the statute of limitations) were for definite amounts, the aggregate of which, together with said delinquent taxes, were less in amount than the balance of unpaid purchase money due and payable on the day fixed for completing the contract, and they were all *presently payable*.

There was also a coupon judgment for taxes, but the effect of an agreement of counsel is to eliminate that from the case. If there had been no such agreement, however, this

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judgment would have fallen within the description of the three judgments above referred to, except that it was not barred by the statute of limitations.

With respect to the telephone line, the following should be noted :

1. The testimony for defendants tended to show that at least a portion of it, alongside the said land, had been erected and was obvious to the plaintiff, had he looked about him, when the latter was on the land prior to his purchase. There was sufficient evidence for the jury to have inferred that this easement was visible and notoriously affected the physical condition of the land at the time of the purchase.

2. The evidence, as it must be regarded by us, is to the effect that the telephone line was a benefit, rather than an injury, to the market value of the land.

3. The telephone line, if considered as marring the appearance or outlook from the land, was no more objectionable than the Western Union Telegraph line alongside of it.

With respect to the conveyance of said land, the facts were that a deed from defendant, in proper form, in strict accordance with the provisions of said contract, was duly executed by defendants and tendered to the plaintiff on said date fixed for completing the contract, to-wit, August 19, 1915, that he declined to accept the deed, or to comply with the terms of the contract on his part by paying the \$15,-500.00 balance of purchase money; and that plaintiff offered to cancel the contract if the \$500.00 was paid back to him and "call the deal off."

The testimony was conflicting on the point as to whether defendants, or either of them, ever agreed to the latter proposition, the testimony for defendants positively denying any such agreement, and the testimony for plaintiff being to the effect that there was such an agreement, which, if it existed however, was oral, not in writing and not under seal.

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Lassiter & Drewry, for the plaintiff in error.

Hamilton & Mann, for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The rules of law governing all the points arising in this case are well settled, so that a limited reference to the authorities, without discussion of them, will be deemed sufficient.

This is an action by a purchaser of land to recover back a payment on account of purchase money under an unexecuted contract on the grounds, (1) that the title of the vendor was not such as the purchaser was entitled under the contract to require; and (2) on the ground that the purchaser was released by the vendor from the contract of purchase under seal by the subsequent oral agreement above referred to.

We will pass upon these defenses in the order in which we have stated them, and incidentally upon the points of law arising therefrom urged upon us in argument by counsel on both sides of the case.

1. Concerning the title the plaintiff had the right to require:

The plaintiff had the right to require only such title as he contracted for. He did not contract for a record title (*Mundy v. Garland*, 116 Va. 937, 83 S. E. 491), nor for one which an abstract of title would show to be good, or free of liens or encumbrances; nor one in fact free of liens or encumbrances. What he contracted for, indeed, was, by the strict terms of his contract, only "a good and sufficient deed * * * with general warranty and covenants of title." It is well settled, however, that, even at law, a purchaser under such a contract is entitled to require a *marketable title* to be conveyed to him by his vendor. Maupin on

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Marketable Title to Real Estate, secs. 238, 242; 36 Am. & Eng. Anno. Cas., p. 1022, note; *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 455, 7 L. Ed. 219; *Seibel v. Purchase*, (N. J. C. C. of U. S.), 134 Fed. 484; Note 70 Am. Dec. 739; *Little v. Paddleford*, 13 N. H. 167; *Newberry v. French*, 98 Va. 479, 36 S. E. 519; 39 Cyc. 1909, 1983; *Mundy v. Garland*, *supra*. He is entitled to require this on the day fixed by the contract for completing the contract, where the action is at law, as in the instant case; time always being considered of the essence of the contract where it is construed at law. Maupin on Marketable Title, &c., sec. 310; *Bank of Columbia v. Hagner*, *supra*; *Siebel v. Purchase*, *supra*. If either party wishes time after the day fixed, for completing the contract, he must resort to a court of equity where, in proper cases, the rigid rule of the common law on this subject will be relaxed. The vendee under such a contract as that in evidence may, at law, elect to rescind the contract, if his vendor cannot, on the day fixed for completing it, convey to him a marketable title (see authorities above cited), and in such case, as he is not in equity asking the enforcement of the contract and his vendor is in default already, the vendee is not required to tender payment to his vendor of any balance due of unpaid purchase money, or to do any further act himself in completion of the contract, such as tendering notes for deferred payments contracted for, or the like, which would in such case be superfluous. Maupin on Marketable Title, &c., sec. 87; *Morange v. Morris*, 34 Barb. (N. Y.) 311.

2. Now with respect to the question whether the title which the deed from the defendants, which was tendered in the instant case, would have conveyed was a marketable title:

A vendee who is entitled only to a marketable title, "can only demand such title as a reasonably well informed and intelligent purchaser, acting upon business principles, would be willing to accept." 3 Devlin on Deeds, sec. 1474. To

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the same effect see, *Rife v. Lybarger*, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403; *Morrison v. Waggy*, 43 W. Va. 405, 27 S. E. 314.

A vendee is entitled to receive a title free of judgment and tax liens. Maupin on Marketable Title, &c., sec. 124; 10 A. & E. Ann. Cas., note, p. 248. But—

A vendee cannot elect to rescind and treat the contract as rescinded on the ground that the title is not a marketable title because there are encumbrances on the land purchased, if they are of such character and amount that he can apply the unpaid purchase money to the removal of the encumbrances. Maupin on Marketable Title, &c., secs. 246, 304; *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. This can be done where the amount of the encumbrance is definite, does not exceed the unpaid purchase money due, is presently payable (as was the case with the delinquent tax lien in the instant case), and its existence is not a matter of doubt or dispute, or the situation is not such with respect thereto as to expose the vendee to litigation on the subject. (See authorities last cited; also *Miller v. Bronson*, 26 R. I. 62, 58 Atl. 257; *Lindsey v. Humbrecht* (C. C.), 162 Fed. 548.)

As to the three alleged judgment liens unreleased of record, on the date fixed for the completion of the contract, but which were barred by the statute of limitations: If they had not been barred by the statute of limitations, and had not been of such character and amounts that they would have been extinguished by application of the purchase money as aforesaid, such judgments would, at law, have rendered the title unmarketable. Maupin on Marketable Title, &c., sec. 307. Only in equity could the vendor have obtained time in which to have had them released of record by proving payment, etc. However, being barred by such statute, they did not, even at law, render the title unmarketable. *Rife v. Lybarger*, *supra*. Moreover, they were for definite amounts, and less than the purchase money due

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and unpaid would have discharged, and were presently payable, so, for this reason also, they did not render the title unmarketable. (See authorities above cited on this subject.)

As to the telephone line easement:

(a) As the jury may have inferred from the evidence that this easement was visible upon the land at the time of the purchase, as above noted, we must so infer. In such case the purchaser is presumed to have taken into consideration the existence of this encumbrance in fixing upon the amount of the purchase money. Maupin on Marketable Titles, &c., sec. 127, p. 300, and authorities collated in note thereto; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749. See also notes on the subject in 3 L. R. A. 790, 4 L. R. A. (N. S.) 314; 8 L. R. A. (N. S.) 418, 30 L. R. A. (N. S.) 833, and 38 L. R. A. (N. S.) 33.

(b) As the jury may have found from the evidence that this easement was not an injury, but a benefit, to the market value of the land, we must so regard it; in which case it cannot be considered to be an incumbrance of which the plaintiff could complain.

We, therefore, conclude that at the time fixed for completing the contract in the instant case, the vendors could have, and by the deed which they tendered to the plaintiff would have, conveyed to him a marketable title, such as was contracted for.

We come now to the remaining question for our determination, on the merits of the case, namely:

2. Was there a release of the plaintiff by the defendants from the obligation of the contract, by the alleged subsequent parol agreement, above referred to in the statement of facts?

At law, the common law rule that an executory contract under seal can be modified or abrogated only by an instrument of equal dignity, *i. e.*, by one under seal, has not been relaxed. It is only in equity, where the distinctive equitable principles applicable in that forum may be invoked, that

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there has been a relaxation of such rule. 2 Minor on Real Prop., sec. 1315; 4 Wigmore on Ev., sec. 2455; *Campbell v. Alsop*, 116 Va. 46, 81 S. E. 31; Jones on Ev. (1912—2d Pocket Ed.), sec. 443. The argument for the abolition of this rule (see authorities last cited and also note 7 Va. L. Reg. 204) might be addressed with great force to the legislature. It is not within the function of courts to change well established rules of law.

Further: It will be noted that the contract in the instant case was not in fact cancelled by mutual agreement. If such a mutual agreement had been executed by actual cancellation or destruction of the contract, it would have operated to have annulled it. 2 Minor's Inst. (3d ed.), p. 742. There was, however, merely an alleged parol agreement to cancel the contract—itself an executory agreement. The mutual relinquishment of their respective rights under the contract by the parties thereto would have been a sufficient consideration to have supported the executory agreement for its release; but the latter being by parol, could not, had it existed as a fact, operate, at law, to release the obligations of the contract under seal.

However, in the instant case, upon the conflict of evidence on this point, the jury may have found, and we must therefore hold, that no agreement was made by defendants to release the plaintiff from the obligation of the contract, before the time fixed for its completion.

For the foregoing reasons, we are of opinion that the trial court committed error in sustaining the demurrer of the plaintiff to the evidence of the defendants, because of which the judgment complained of must be reversed, set aside and annulled, and this court will enter such judgment as the trial court should have entered.

Reversed.

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SEABOARD AIR LINE RAILWAY V. ABERNATHY.

June 14, 1917.

Absent, Burks, J.

1. **CROSSINGS—Degree of Care Required of Traveler.**—The degree of care, which a traveler approaching a railway crossing is required to exercise, is ordinary care.
2. **CROSSINGS—Instructions—Contributory Negligence of Plaintiff.**—In an action for injuries sustained at a crossing, the court instructed that the jury could not find the plaintiff guilty of contributory negligence "if they believe from the evidence that in approaching said track and proceeding over said crossing, the plaintiff exercised such precaution for his safety as a person of ordinary prudence would have exercised under the circumstances disclosed by the evidence. Whether or not it was a lack of ordinary care, as defined in these instructions, on the part of the plaintiff, under the facts and circumstances disclosed by the evidence, not to have stopped before crossing the track on which he received the injury complained of, is a question of fact for the jury." While in many cases of accidents at crossings where the traveler's contributory negligence is manifest, such an instruction would be objectionable because misleading, it was, nevertheless, particularly applicable in this case, in which, in twelve instructions, the defendant company had presented to the jury its theory that plaintiff had been guilty of such contributory negligence as to bar his action.
3. **NEGLIGENCE—Questions of Law and Fact.**—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ as to the negligence charged, the question is not one of law but of fact to be determined by the jury under proper instructions from the court. In such case, if the jury might have found for the plaintiff, on the defendant's demurrer to the evidence, the court must so find.
4. **CROSSINGS—Degree of Care Required of Traveler.**—It is the imperative duty of a traveler approaching a railway crossing

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to look and listen where looking and listening would be effective, and to stop if necessary in order to avoid a collision; and in many cases such an instruction as that set out in the second headnote might mislead the jury and induce them to ignore or disregard this rule. But in the instant case it was proper to instruct the jury as to the degree of care which the plaintiff should exercise in approaching this crossing at which his view was so obstructed that he could not see from a place of safety, while the absence of noise from the detached cars rolling down grade made his listening ineffective, and where there was no safe place in which to stop in order to see, hear and take the necessary precautions.

5. **CROSSINGS—Degree of Care Required of Traveler—“Ordinary Care.”**—Although the giving of the instruction set out in headnote 2 was not reversible error, a better definition of ordinary care is that it means such care and caution as an ordinarily prudent and reasonable person would have exercised under the same circumstances, conditions and surroundings.
6. **CROSSINGS—Contributory Negligence of Traveler—Stopping.**—It is not contributory negligence for the driver of an automobile not to stop upon the track between stationary cars, in an opening made in a train for the purpose of permitting travelers to cross that track, to look and listen for cars or trains approaching on another track on the further side of the opening. There can hardly be a more dangerous place for an automobile to stop than on a railroad track between cars recently uncoupled for the purpose of opening the highway.
7. **DAMAGES—Crossing—Automobile.**—In an action for damages sustained in a collision between plaintiff's Ford automobile and cars of defendant company at a crossing, the evidence was that the machine was “wrecked,” and that all that was left of it was the engine and that had not been removed from the scene of the accident at the time of the trial. As the value of an engine of such an automobile, in such a condition, may be said to be almost negligible, and there was no evidence of its salvage value offered, it was not reversible error to instruct the jury that if they should find for the plaintiff, in estimating his damages, they should take into consideration the value of the automobile which was “destroyed” at the time of the collision.
8. **CROSSINGS—New Trial—Negligence—Case at Bar.**—In the instant case there was gross negligence on the part of the defendant company's servants in sending four cars down an incline without any efficient control. Just such an accident to some traveler upon the highway as happened might have been

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anticipated from such a movement, and the question of the plaintiff's contributory negligence was one about which fair-minded men might honestly differ, and was, therefore, properly submitted to the jury. Where the negligence of defendant railroad is clearly established, and the question of the contributory negligence of the plaintiff is properly submitted to the jury, the verdict of the jury will not be set aside as contrary to the law and the evidence.

Error to a judgment of the Circuit Court of Brunswick county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

E. Randolph Williams, Henry W. Anderson and Andrew D. Christian, for the plaintiff in error.

Buford & Peterson, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

C. P. Abernathy was seriously injured by the collision of a Ford runabout automobile, driven by himself, with four cars which were coupled together but detached from the engine of the Seaboard Air Line Railway (hereinafter called the Company) while he was attempting to cross the track at Alberta which connects the main lines of the Virginian Railway and the Seaboard, which intersect there.

He recovered a judgment in the trial court, and the company is here complaining.

The pertinent facts are these: For the purpose of transferring cars between the two lines of railway at Alberta there is a connection track running east and west about a quarter of a mile in length, and as the Virginian crosses over the Seaboard main line, this connection track has a slight grade, the fall being from west to east. Parallel with

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this connection track, on the south side thereof, is an additional track, known as the "house" track, used for the placing of cars for unloading at the freight station. Between the north rail of the house track and the south rail of the connection track the distance is eight feet, six inches. On the north side of the connection track there is an additional track known as the mill track. There is a road, with which Abernathy was familiar which turns almost due north and passes at right angles over the three tracks referred to. On the west side of this road and south of the house track, is a small warehouse about twenty feet away, and on the east side thereof south of and abutting on the house track, there is a freight depot about fifty feet away.

An engine of the Company was engaged in the movement and placing of cars on the house and connection tracks. The train on the house track had been cut at the road crossing, leaving a space of from twelve to fifteen feet between the cars, so as not to obstruct the highway, and the engine had taken six other cars for the purpose of placing them. For some unexplained reason a brakeman, without the knowledge of the conductor, had uncoupled four of these six cars, detaching them from the engine, and they were moving down the grade of the connection track from west to east at a speed of five or six miles an hour. Abernathy testified that his view of the track was absolutely obstructed by the cars on the house track. The gondola which struck the automobile was lower than the cars standing on the house track and for that reason could not be seen by Abernathy until he emerged from between the cars on the house track. The four detached cars, consisting of two gondolas and two box cars, the gondolas being in front, were making little if any noise during this down-grade movement on the connection track. The conductor testified that he did not know that the cars were detached from the engine until the automobile was struck; that he gave the signal for the engineer

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to stop, and as there was no response he turned to see what the trouble was and then he ran and set a hand brake which stopped the cars.

The plaintiff testified that when he got to the crossing it seemed to him that the opening between the standing cars was as narrow as he had ever seen it up to that time; that he looked and listened all he could without stopping the automobile; that he was going as slow as he could without stopping, it seemed to him; that he looked to see if he could see a train, and then looked over the cars to see if he could see any smoke; that when he got to the connection track the car was within six feet of him; that there was no chance at all for him to get out of the way; that when he came up he was running as slow as he could to be moving; that he looked to see if he could see any smoke or hear the sound of any cars and heard nothing and saw nothing; that when he got to the connection track he looked and immediately he was struck and knocked down; that the cars were right on him and it didn't appear to be a second from the time he got on the track before he was struck; and that he saw the car as soon as there was any possible chance of seeing it.

1. The first assignment of error is that the court erred in giving instructions "C" and "D," asked for by the plaintiff.

(a) Instruction "C" reads as follows: "The court instructs the jury that they cannot find the plaintiff guilty of contributory negligence if they believe from the evidence that in approaching said track and proceeding over said crossing, the plaintiff exercised such precaution for his safety as a person of ordinary prudence would have exercised under the circumstances disclosed by the evidence. Whether or not it was a lack of ordinary care, as defined in these instructions, on the part of the plaintiff, under the facts and circumstances disclosed by the evidence, not to

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have stopped before crossing the track on which he received the injury complained of, is a question of fact for the jury."

It should not be necessary to cite authority for the proposition that the degree of care, which a traveler approaching a railway crossing is required to exercise, is ordinary care, and while in many cases of accidents at crossings where the traveler's contributory negligence is manifest, such an instruction would be objectionable because misleading, it was, nevertheless, particularly applicable in this case, in which, in twelve instructions, the company had presented to the jury its theory that Abernathy had been guilty of such contributory negligence as to bar his action.

The rule is stated in *City of Norfolk v. Anthony*, 117 Va. 777, 86 S. E. 68, to be this: "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ as to the negligence charged, the question is not one of law but of fact to be determined by the jury under proper instructions from the court."

In such a case, if the jury might have found for the plaintiff on the defendant's demurrer to the evidence, the court must so find. *Saunders v. Southern Ry. Co.*, 117 Va. 396, 84 S. E. 650; *Perkins v. Southern Ry. Co.*, 117 Va. 351, 85 S. E. 401; *Southern Ry. Co. v. Jones*, 118 Va. 689, 88 S. E. 178.

There are doubtless many instances of injuries at crossings where the giving of such an instruction as is complained of here might mislead the jury and induce them to ignore or disregard the well established rule of law imposing upon travelers approaching railway crossings the imperative duty to look and listen where looking and listening would be effective, and to stop if necessary in order to avoid a collision. In a case like this, however, it was proper to instruct the jury as to the degree of care which the plaintiff

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should exercise in approaching this crossing at which his view was so obstructed that he could not see from a place of safety, while the absence of noise from the detached cars rolling down grade made his listening ineffective, and where there was no safe place in which to stop in order to see, hear and take the necessary precautions.

The better form of defining ordinary care in such cases may be found in instruction 6, which was given in *Southern Railway Company v. Vaughan*, 118 Va. 696, 697, 88 S. E. 306, L. R. A. 1916 E, 1222, reading thus:

"The court further instructs the jury that ordinary care, as expressed in the foregoing instructions, as applied to each, the decedent and the defendant, means such care and caution as an ordinarily prudent and reasonable person would have exercised under the same circumstances, conditions and surroundings." This instruction, in an opinion by Keith, P., was regarded as unobjectionable in view of the facts of that case.

The giving of the instruction here complained of, in view of the evidence in this case, presents no reversible error, though, as above indicated, we think the instruction quoted from *Southern Ry. Co. v. Vaughan*, *supra*, contains a proper and preferable statement of the law.

In this case counsel for the company appear to base their charge of contributory negligence imputable to Abernathy on his failure to stop upon the house track between the stationary cars in the opening made in the train for the purpose of permitting travelers to cross that track, for this was the only place at which he could possibly have stopped and had any view of the detached cars approaching on the connection track. Doubtless, if he had stopped upon that house track for the purpose of making such an investigation and been injured because these cars were brought together suddenly, a demurrer to the evidence would have been sustained upon the ground that there can hardly be a more dan-

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gerous place for an automobile to stop than on a railroad track between cars recently uncoupled for the purpose of opening the highway.

There were only eight feet, six inches, between the inside rails of the two tracks, and by the time the driver of the automobile had cleared the overhang of the cars upon the house track, the front of his machine must have been upon the connection track, or so close thereto as to expose him to extreme danger. If, however, he had stopped his car before getting upon the house track and gone forward to observe the condition of things upon the connection track and found the crossing apparently safe, by the time he had again started his automobile and attempted to cross, a dangerous situation might have developed—indeed, an accident similar to this very accident might have occurred. Under these circumstances, it seems to be peculiarly appropriate that the question as to whether or not the plaintiff was guilty of contributory negligence should have been submitted to the jury, and certainly it would have been error for the lower court to have told the jury as a matter of law that the plaintiff should, within the space of less than eight feet, six inches, have been able, while his car was slowly moving, to look in both directions and stop in time to have avoided the accident.

(b) It is further complained that instruction “D” was erroneous because it told the jury that, if they should find for the plaintiff, in estimating his damages they should take into consideration the value of the automobile which was “destroyed” at the time of the collision.

The evidence is that the machine was “wrecked,” and that all that was left of it was the engine and that had not been removed from the scene of the accident at the time of the trial. As the value of an engine of such an automobile, in such a condition, may be said to be almost negligible, and there was no evidence of its salvage value offered, we do not regard this as reversible error.

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2. The second assignment of error is that the court refused to set aside the verdict as contrary to the law and the evidence, and because of misdirection of the jury.

From what we have said heretofore, it is apparent that, under the facts above stated, there was gross negligence on the part of the company's servants in sending four cars down an incline without any efficient control. Just such an accident to some traveler upon the highway as happened might have been anticipated from such a movement, and the question of the plaintiff's contributory negligence was one about which fair-minded men might honestly differ, and was, therefore, properly submitted to the jury.

The case is governed by that line of cases involving injuries at crossings where the negligence of the defendant was clearly established, and in which the question as to whether or not the contributory negligence of the plaintiff should bar his recovery, was submitted to the jury, for which many authorities might be cited, among which are: *Demaine v. Washington, &c. Co.*, 2 Va. Dec. 499, 27 S. E. 437; *Norfolk & W. Ry. Co. v. Burge*, 84 Va. 63, 4 S. E. 21; *Nichols v. W. O. W. & R. Co.*, 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257; *Norfolk & W. R. Co. v. Holmes*, 109 Va. 407, 64 S. E. 46; *Norfolk & W. Ry. Co. v. Munsell*, 109 Va. 417, 64 S. E. 50; *Higgins v. Southern Ry. Co.*, 116 Va. 890, 83 S. E. 380; *Perkins v. Southern Ry. Co.*, *supra*; *Southern Ry. Co. v. Vaughan*, *supra*; *Southern Ry. Co. v. Adkins*, 119 Va. 746, 89 S. E. 847.

There is no error in the judgment.

Affirmed.

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Mythville.**SNEAD AND OTHERS V. ATKINSON AND OTHERS.**

June 14, 1917.

Absent, Burks, J.*

1. **DISMISSAL, DISCONTINUANCE AND NONSUIT**—*Effect of Striking Cause from Docket Under Section 3312, Code of 1904.*—Section 3312 of the Code of 1904 provides: "Any court in which is pending a case wherein for more than five years there has been no order or proceeding except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. A court making such order may direct it to be published in such newspapers as it may designate. Any such case may be reinstated, on motion, within one year from the date of such order, but not after." A cause stricken from the docket under this provision cannot be reinstated after the lapse of one year, except by consent of all parties. A decree striking a cause from the docket is an adjudication that everything has been done in the cause that the court intends to do. The decree may be erroneous, but the error does not render it less final, and the court having by its order put the cause beyond its control, cannot upon a discovery of error recall it in a summary way and resume a jurisdiction which has been exhausted.
2. **ORDERS**—*Validity—Jurisdiction of Court.*—In order to enter valid orders a court must have jurisdiction of the cause in which such orders are entered, and no valid orders can be entered in a case which has been once finally disposed of, unless it has been first legally reinstated.
3. **EQUITY**—*Equity will Consider the Substance and not the Form—Laches.*—An equity court will always consider the substance and not the form. This doctrine is a wholesome one and is favored by courts of equity, but always for the purpose of promoting substantial justice, never for the purpose of perpetrating a wrong in the name of equity. In the instant case a suit to enforce a judgment lien was stricken from the docket, the original judgment debtor was dead; and all the parties

*Case submitted before Judge Burks took his seat.

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familiar with the facts were dead, except the creditor. The lands in question had been acquired by the appellants and improvements had been made upon them, and they had held their lands under title derived from the judgment debtor or his heirs at law for more than fifteen years, during which time the judgment creditor had slept upon his rights.

Held: That the above doctrine of equity could not be invoked in favor of the judgment creditor. His delay in asserting his lien has been unexplained by him, and because of the death of the debtor and of those familiar with the subject matter in his lifetime is now inexplicable. One who has been silent when he should have spoken will not be permitted to speak when he should be silent.

Appeal from a decree of the Circuit Court of Goochland county. Decree for defendants. Complainants appeal.

Reversed.

The opinion states the case.

Smith & Smith and Samuel A. Anderson, for the appellants.

Jos. P. Sadler and W. M. Justis, Jr., for the appellees.

PRENTIS, J., delivered the opinion of the court.

The appellants, John T. Snead, Ella Logan, who was formerly Ella Bowles, Daniel Hobson, Emma Farrar, Howard Hobson, James Henry Hobson, Minnie Hobson, Saunders Hobson, Florence Hobson, the last three of whom are infants, suing by Mat Hobson, their father and next friend, Mat Hobson, in his own right and as the surviving husband of Lucy Hobson, filed their bill in the Circuit Court of the county of Goochland against W. J. A. Atkinson, William Crouch, administrator of E. J. Duval, J. P. Sadler, special commissioner, William Crouch, substituted trustee, B. O.

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James, trustee, and A. R. Anglea, the object of which was to enjoin any further proceedings to execute a certain decree entered on December 9, 1912, upon the ground that it is null and void.

The defendants demurred to the bill, the court sustained the demurrer, and this is assigned as error.

These facts appear: On or about the 3rd day of April, 1889, W. J. Atkinson, guardian of W. J. A. Atkinson, suing for the benefit of L. W. Reams, curator of the estate of W. J. A. Atkinson, recovered a judgment in the Circuit Court of Goochland county against E. J. Duval, for the sum of \$2,375.24, with interest from July 1, 1886, and costs, which judgment was docketed on the 10th day of April, 1889. On the 17th of August, 1889, a creditors' suit was brought against Duval, to subject his real estate to the lien of said judgment. The usual proceedings were had and decrees were entered directing the sale of certain lands of the defendant, Duval, including a valuable farm called Goat Hill, upon which the debt was also a lien by deed of trust, as well as certain other lands now claimed by the appellants. Pursuant to these decrees, the farm called Goat Hill was sold to the creditor for \$2,200, which sale was confirmed by the court in August, 1891, the net proceeds of the sale being credited upon the judgment, and a decree directing a deed to be made to the purchaser by the special commissioners was entered on April 1, 1892. No sale was made of any of the other tracts of land of the judgment debtor, Duval, and they have been since acquired by the appellants. W. J. A. Atkinson attained his majority on the 15th day of August, 1891, and by decree of September 3, 1891, he became a party complainant to the suit for the enforcement of the said lien. No other decree was entered in that cause until September 10, 1903, when an order was entered striking the cause from the docket under section 3312 of the Code, which provides:

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"Any court in which is pending a case wherein for more than five years there has been no order or proceeding except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. A court making such order may direct it to be published in such newspaper as it may designate. Any such case may be reinstated, on motion, within one year from the date of such order, but not after."

The judgment debtor, Duval, died in August, 1896. The case was stricken from the docket during the lifetime of counsel who brought the suit. No copy of the order of dismissal entered in 1903 was filed in the papers of the cause, but the original papers had been filed with the ended causes, and the clerk's fees had been taxed and paid.

In this state of the record the judgment creditor, W. J. A. Atkinson, filed a petition in the said ended cause and had process issued on the 27th day of February, 1908, against Crouch, the administrator of Duval, John T. Snead, Lucy Hobson, Thomas B. Clarke, trustee, and Mary F. Henley, the object of which was to enforce his lien against the lands claimed by the appellants for the balance due on the said judgment. This petition alleged that the original suit was then pending, although it had been dismissed more than four years before that time. Some of the appellants who were defendants to that petition answered it, and certain proceedings were had, the result of which was that on the 9th day of December, 1912, the court entered a decree directing a sale of the lands held by the appellants. At this time the appellants were ignorant of the fact that the original cause had been stricken from the docket. On or about the 5th of March, 1913, their attorney for the first time learned that the original cause had been stricken from the docket on September 10, 1903, and thereupon informed counsel for Atkinson. Thereafter the appellants instituted this suit on the 8th day of June, 1914, to avoid that decree.

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The court sustained the demurrer of the defendants and dismissed the bill, and of this decree the appellants are here complaining.

The question, then, now to be determined, is whether or not the decree of the 9th of December, 1912, subjecting the lands held by the appellants to the lien of the judgment, is void. What then is the effect of striking a case from the docket under the statute above referred to?

In *Echols v. Bronnan*, 99 Va. 150, 37 S. E. 786, it was expressly determined that a cause stricken from the docket under that statute cannot be reinstated after the lapse of one year, except by consent of all parties. In that case, all of the parties except one had consented, but this court held that all of the decrees entered after the cause was dismissed from the docket were void and that the lower court had no jurisdiction to enter them. It was also held that a decree striking a cause from the docket is an adjudication that everything has been done in the cause that the court intends to do. The decree may be erroneous, but the error does not render it less final, and the court having by its order put the cause beyond its control, cannot upon a discovery of error recall it in a summary way and resume a jurisdiction which has been exhausted.

In *Battaile v. Maryland Hospital*, 76 Va. 69, a parcel of land in Caroline county had been sold, the proceeds distributed, and the special commissioner had been directed to sell an undivided interest in a tract of land in Loudoun county. Before the Loudoun county land had been sold, however, the court entered an order on the 25th day of March, 1872, striking the cause from the docket. Afterwards, on March 25, 1874, without notice to any of the parties, the cause was reinstated, the order of reinstatement saying that it had been erroneously stricken from the docket. This court, however, held that this latter order was erro-

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neous, inasmuch as the decree removing the case from the docket was final, and that all orders and decrees entered thereafter were void.

These cases are decisive of the case at bar, for it must be indisputable that in order to enter valid orders a court must have jurisdiction of the cause in which such orders are entered, and no valid orders can be entered in a case which has been once finally disposed of, unless it has been first legally reinstated. *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

Mr. Freeman says, as to a void judgment: "If it be null, no action on the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, can invest it with any of the elements of power or vitality." Freeman on Judgments, sec. 117. *Wade v. Hancock*, 76 Va. 626.

Counsel for the appellees appreciate the force of these well established doctrines and seek to escape the consequences thereof by invoking another rule, namely, that an equity court will always consider the substance and not the form, and therefore urge that the petition filed in the ended suit should be construed as in effect a new suit, because it was filed at rules, the parties summoned to answer the petition, and some of the parties defended. This latter doctrine is a wholesome one and is favored by courts of equity, but, so far as we are informed, always for the purpose of promoting substantial justice, never for the purpose of perpetrating a wrong in the name of equity. In the case at bar all of the equities are against the appellees. The original judgment debtor, Duval, lived for several years after the sale of the Goat Hill tract of land above referred to, and during all of these years, in the suit then pending, the creditor had all of the rights that he had at the time he filed his petition. Now all of the parties familiar with the facts have died, except the creditor. Since the sale of Goat

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Hill the lands here involved have been acquired by the appellants, improvements have been made thereon, and they have held their lands under title derived from the judgment debtor or his heirs at law for more than fifteen years, during which time the judgment creditor has slept upon his rights. His delay in asserting his lien has been unexplained by him, and because of the death of the debtor and of those familiar with the subject matter in his lifetime is now inexplicable. One who has been silent when he should have spoken will not be permitted to speak when he should be silent. Pom. Eq. Jur. (3d ed.), sec. 818.

We have no doubt that all of the decrees entered after the original cause was stricken from the docket are absolutely null and void, and, therefore, the demurrer to the bill of appellants should have been overruled and the relief prayed for granted. A decree embodying these views will be entered by this court.

Decree Reversed.

Mytherville.

TRIPLETT AND OTHERS V. SECOND NATIONAL BANK OF
CULPEPER.

June 14, 1917.

Absent, Burks, J.*

1. OFFICERS AND AGENTS OF PRIVATE CORPORATIONS—*Evidence—Unauthorized Statements of Director.*—Testimony as to statements made by a director of a bank, the holder of a note, to an endorser was properly excluded in an action against the drawer and endorser of the note. There being no suggestion that the director had any authority from the bank to make any special contract or agreement with the endorser, the unauthorized statements of the director could not affect the rights of the bank.
2. APPEAL AND ERROR—*Admissibility of Evidence.*—The refusal of a trial court to permit a witness to answer a question will not be considered on appeal when the expected answer is not given, as the court cannot determine its materiality.
3. SURETYSHIP—*Release—Bills, Notes and Checks—Release of Endorser.*—A surety is entitled to be relieved from his liability to pay the debt of his principal, either in whole or in part as the case may be, if the creditor, without the consent of the surety, releases any lien which he may have on any property of the principal as security for the debt, and it is the duty of a creditor holding collateral securities to preserve them and be ready to surrender them to the debtor when he demands payment of the debt. But in the instant case the evidence utterly failed to show that the creditor ever had possession or control of any collateral security for the debt involved or released any lien thereon.
4. BILLS, NOTES AND CHECKS—*Attorney's Fee.*—A provision on the face of a negotiable note for an attorney's fee for making collection is valid, subject always to the power of the court if the fee be unreasonable in amount or unconscionable, to reduce it.

*Case submitted before Judge Burks took his seat.

Opinion.

Error to a judgment of the Circuit Court of Culpeper county, in an action of debt. Judgment for plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

J. D. Richards and *Wm. Horgan*, for the plaintiffs in error.

J. G. Hiden, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The defendant in error, Second National Bank of Culpeper, Virginia, hereinafter called the Culpeper bank, instituted its action of debt against L. E. Triplett, drawer, Wilhemina Triplett and Edwina Triplett, endorsers, hereinafter called the defendants, upon a negotiable note acquired in due course of business, and a jury being waived, recovered judgment thereon with ten per cent. in addition as attorney's fee for collection.

The defendants allege as error that Edwina Triplett was not permitted to testify as to a conversation with C. Jones Rixey at the time she endorsed the note on June 21, 1909. This note was a renewal of a long series of notes, and as one of her sisters, Mabel H. Triplett, had married and was about to leave the country, Edwina Triplett succeeded her as endorser. Mr. Rixey was, at the time, a director of the Culpeper bank. It appears that at the time of the trial Rixey had been committed to an insane asylum, and upon an exception by the bank the court refused to permit Edwina Triplett to testify as to a conversation had with Mr. Rixey referring to her liability upon the note and the collateral security held therefor.

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Whether this testimony was properly excluded upon the ground that Mr. Rixey was incapable of testifying, it is unnecessary to determine, because, even if he had been capable of testifying it does not appear that the evidence could have been relevant upon the issue joined. That a certain insurance policy had been pledged as collateral security for this and other notes, and all the facts with reference to this collateral fully appear in the evidence. There is no suggestion that Mr. Rixey had any authority from the bank to make any special contract or agreement with Miss Triplett, and it only inferentially appears that he made some statement to her with reference to this policy of insurance. The testimony was clearly inadmissible because Mr. Rixey's unauthorized statements could not affect the rights of the Culpeper bank.

It is also true that this court cannot determine whether or not any such testimony would have been given by the witness which might possibly have been relevant to some of the issues in the case, because the record does not show what answer or answers the witness would have made; and the rule is well settled in this State, that the refusal of a trial court to permit a witness to answer a question will not be considered in this court when the expected answer is not given, as the court cannot determine its materiality. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 157, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Greever, &c. v. Bank of Graham*, 99 Va. 547, 39 S. E. 159; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307; *Cutchin v. Roanoke*, 113 Va. 475, 74 S. E. 403; *Holladay v. Moore*, 115 Va. 71, 78 S. E. 551.

Another assignment of error is based upon the well established doctrine of the law that a surety is entitled to be relieved from his liability to pay the debt of his principal, either in whole or in part as the case may be, if the creditor, without the consent of the surety, releases any lien which he may have on any property of the principal as security

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for the debt, and that it is the duty of the creditor holding collateral securities to preserve them and be ready to surrender them to the debtor when he demands payment of the debt.

While the doctrine is sound, the evidence in this case utterly fails to show that the creditor ever had possession or control of any collateral security for the debt here involved or released any lien thereon. The pertinent facts as to this collateral appear to be, that in April, 1903, Mrs. L. E. Triplett, the drawer of the note, took out a policy of insurance in the Equitable Life Assurance Society of New York for \$5,000; that between October, 1906, and December, 1908, Mrs. Triplett, her husband and daughter obtained from C. J. Rixey, individually, loans aggregating, say, \$5,000, and gave their notes therefor, among which was a note for \$750, of which the note sued on is the last renewal; that on the 12th day of May, 1908, Mrs. Triplett assigned this policy to C. J. Rixey to secure this indebtedness; that C. J. Rixey transferred and assigned all of this indebtedness together with the insurance policy referred to, as collateral security therefor, to the Virginia Safe Deposit and Trust Corporation of Alexandria, hereinafter called the Alexandria bank; that said note for \$750, of which the note sued on is a renewal, was for value sold and transferred in due course of business by the Alexandria bank to the Culpeper bank; that the policy of insurance was never at any time held by the Culpeper bank, nor was it ever assigned in whole or in part to the Culpeper bank; that from 1906 until April 23, 1908, the \$750 note was renewed through the Alexandria bank, but on the last named date those interested arranged with the Culpeper bank to carry it, and thereafter it was renewed with the Culpeper bank; that Wilhemina Triplett became an endorser on the 8th of December, 1909, and in January, 1910, the note was renewed with Wilhemina and Edwina Triplett as endorsers, and

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thereafter renewals were made from time to time until the 25th day of October, 1913, when the note was dishonored and duly protested for non-payment; that no objection was ever raised to the holding of said policy by the Alexandria bank and no suggestion ever made that the Culpeper bank must look only to the policy of insurance for the payment of the note sued on until after the note had been dishonored and suit threatened.

The Alexandria bank became insolvent and its assets were taken over by a receiver. Mrs. Triplett failed to pay the premiums upon the policy, and in order to preserve the security, the receiver of the Alexandria bank paid several of such premiums, until after full notice to the defendants, the policy by direction of court was cancelled, its cash surrender value collected by the receiver of the Alexandria bank and the proceeds properly apportioned between the several notes for which it had been pledged as collateral. The share apportioned to the note sued on was \$90.44, for which credit is allowed in the judgment.

These being the facts, the court rightly gave judgment for the amount claimed.

Another error alleged is that the judgment allowed ten per cent. on the face of the note as an attorney's fee for making the collection.

This fee was expressly provided for in the face of the note, and while there has been some difference of opinion, the question has been settled in this State in favor of the validity of such a provision subject always to the power of the court if the fee be unreasonable in amount or unconscionable, to reduce it, by the recent case of *Colley v. Summers, &c., Co.*, 119 Va. 439, 89 S. E. 906.

The question is well discussed in 2 Va. Law Reg. (N. S.), No. 5, September, 1916, p. 321.

There is no error in the judgment and it will be affirmed.

Affirmed.

Syllabus.

Mytherville.

TURNER V. RICHMOND AND RAPPAHANNOCK RIVER RAILWAY
COMPANY.

June 14, 1917.

Absent, Burks, J.

1. **APPEAL AND ERROR—*Second Trial.***—Where a trial has been had in an action at law and a verdict rendered in favor of the plaintiff, which the trial court set aside, and to which ruling the plaintiff excepted, and at the second trial the plaintiff declined to introduce any evidence and suffered a verdict to be found for the defendant, which verdict he moved to set aside and excepted to the action of the trial court overruling that motion and entering judgment for the defendant, the Supreme Court of Appeals must review the proceeding on the first trial, and if it finds that error was committed in setting aside the first verdict, it must annul all proceedings subsequent to that verdict, and render judgment thereon.
2. **MASTER AND SERVANT—*Assumption of Risk—Question for Jury.***—Whether or not a servant knew or ought to have known of the dangerous condition of his place of work and hence assumed the risk thereof is a question for the jury, when the danger is not so open and obvious and not so apparent as to charge him with knowledge thereof as a matter of law.
3. **NEW TRIAL—*Verdict Contrary to the Law and the Evidence—Conflicting Evidence.***—Where a question was resolved by the verdict of the jury in favor of the plaintiff on conflicting evidence, the verdict ought not to be disturbed, provided the case was fairly submitted to the jury on the instructions.
4. **MASTER AND SERVANT—*Assumption of Risk—Instructions—Case at Bar—Appeal and Error—Harmless Error.***—In an action by a servant against his master for injuries inflicted upon him from being kicked by a mule, the property of the master, the court instructed the jury that the servant did not assume the risk of injury by a vicious mule, about which he had to work, but of the vicious and dangerous character of which he did not know and could not have found out by the exercise of

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ordinary care, and of which he was not warned by defendant or its employees, who knew or ought to have known thereof. The incorporation of the words "or its employees" in this instruction, if error, was harmless error, so far as defendant was concerned. If the plaintiff had knowledge, no matter how that knowledge was obtained, of the vicious and dangerous nature of the mule, such knowledge would defeat his right to recover; because if he knew the vicious and dangerous propensities of the animal, he would be held to have assumed the risk. Therefore, an instruction, the tendency of which was to increase the plaintiff's sources of knowledge must enure to his prejudice and to the benefit of the defendant, and such was the effect of the superadded words "or its employees."

5. **FELLOW SERVANTS—Vice-Principal**—Mere superiority in rank of a foreman put in charge of a gang of hands does not *per se* affect his relation of fellow servant to those working under him. But a different principle applies where the foreman is engaged in the discharge of a non-assignable duty for the master. In the latter case, he is not a fellow servant but a vice-principal.
6. **MASTER AND SERVANT—Liability of Master—Safe Appliances—Vicious Animals**.—It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities where-with to do his work, and where the master knows or should know that an animal furnished for the use of the servant is vicious, he is liable for injuries to his servant caused thereby, subject, of course, to the qualification that the vicious and dangerous propensities of the animal are unknown to the servant, and that he is not guilty of contributory negligence.
7. **FELLOW SERVANTS—Vice-Principal**.—In the instant case the safe appliance doctrine imposed upon the defendant the duty of using ordinary care to furnish the plaintiff, as stable boss, with a reasonably safe mule in connection with the discharge of the duties imposed upon him by that employment, and the defendant's foreman in discharging or failing to discharge such duties of defendant company was not the fellow servant of the plaintiff but a vice-principal for whose negligence, if any, the defendant is liable to plaintiff if it was the proximate cause of his injury, and plaintiff himself was free from negligence.

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Error to a judgment of the Circuit Court of Henrico county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Smith & Gordon and James F. Minor, for the plaintiff in error.

Williams & Mullen and Thomas P. Bryan, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

Charles Turner, a minor seventeen years of age, who at the time of the grievance complained of was an employee of the defendant in error, brought this action by his next friend to recover damages for personal injuries inflicted upon him from being kicked by a mule, the property of the defendant.

There had been two trials of the case. The first resulted in a verdict for the plaintiff for \$2,000, which the court set aside, and to that ruling the plaintiff excepted. At the second trial, the plaintiff declined to introduce any evidence and suffered a verdict to be found for the defendant, which verdict he moved to set aside and excepted to the action of the court overruling that motion and entering judgment for the defendant. In these circumstances, this court must review the proceeding on the first trial, and if it shall find that error was committed in setting aside the first verdict, it must annul all proceedings subsequent to that verdict, and render judgment thereon. Code, sec. 3484; Burks' Pl. & Pr., pp. 602, 603.

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From the standpoint of a demurrer to the evidence by the defendant, the material facts are these: The defendant was engaged in constructing a railroad from the city of Richmond to Old Church, in Hanover county, and had employed in the work about fifty or sixty mules. These animals, at the time of the accident, were housed in a large stable located in Henrico county. The building was equipped with mangers on each side, but was not divided into separate stalls. C. L. Ruffin was the superintendent of the railroad company and E. W. Thomas the general foreman in charge of the department comprising the live stock and the employees who cared for and worked them. Plaintiff had been in the employment of the defendant for a few days as time keeper when a vacancy occurred in the position of stable boss, and Thomas, with the approval of Ruffin, transferred the plaintiff to that place. His duties as stable boss consisted in looking after and caring for the stock and seeing that they were properly fed and harnessed. He had not had much experience with mules, and had only served as stable boss for a week or ten days when the accident happened.

On November 4, 1915, Thomas ordered the plaintiff to drive up a certain bay mare mule from the stable lot to a manger in the stable and help to catch her. Turner, in obedience to that order, drove the mule into the stable and started to go towards her head to lay hold of the strap around her neck, when, as he expressed it, "that's all I can remember." The plaintiff was carrying out instructions by the direction and in the presence of Thomas, who followed him into the stable and was standing by with a stick in his hand. Thomas testified, "I said, 'Get up, the mule will kill you down there.' He said, 'I can't get up.' I helped him up, and called the blacksmith, and we took him out. * * *"

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This particular mule was shown to be of an unusually vicious and dangerous disposition. Indeed, she might well be characterized (as was another mule in one of the cases cited) "a lurking devil." The witnesses testified that the mule was worked very seldom because Thomas could not get any driver to work her, "and he kept her in the back stall." "When they turned the others out, they turned her out too." "A man would go and lean over the feed box and snap the halter ring and let her go; and when she came back a man would lean over the box and snap it again." It was shown that Thomas knew that the animal was an unusually vicious and dangerous animal, and that nobody could handle her. He told the plaintiff's father that she was "a bad, kicking mule." "I said, 'Did you tell the boy that?' He said, 'No, I never did, * * * I overlooked that, I am sorry it happened, I ought to have told him.'"

Plaintiff was carried to the Retreat for the Sick, in Richmond, where two physicians attended him, and he was in the hospital for sixteen days. One of the attending physicians says: "His nose was broken, his cheek bone fractured, and the upper jaw had been crushed in * * * practically the whole side of his face was caved in * * * and a good many of his teeth were knocked out." Another physician, after speaking of his suffering, says: "* * * possibly after a year or two he developed hemorrhages from the nose so much so that I sent him to a specialist;" and he underwent an operation for that trouble.

We are of opinion that the controlling questions in the case are assumption of risk and contributory negligence, and that both were jury questions under the evidence in this case.

"Whether or not a servant knew or ought to have known of the dangerous condition of his place of work and hence assumed the risk thereof is a question for the jury, when

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the danger is not so open and obvious and not so apparent * * * as to charge him with knowledge thereof as a matter of law." *Powhatan Lime Co. v. Whetzel's Admx.*, 118 Va. 161, 86 S. E. 898; *C. & O. Ry. Co. v. Meadows*, 119 Va. 33, 89 S. E. 244. As to the contributory negligence rule, see *Southern Ry. Co. v. Jones*, 118 Va. 685, 88 S. E. 178.

Both questions were resolved by the verdict of the jury in favor of the plaintiff at the first trial on conflicting evidence, and the verdict ought not to have been disturbed, provided the case was fairly submitted to the jury on the instructions.

The court gave eleven instructions, the correctness of only two of which (Nos. 2 and 3) are drawn in question here.

No. 2 is as follows: "The court, however, instructs the jury that the risk of injury by a vicious and dangerous mule, about which he has to work, but of the vicious and dangerous character of which he did not know and could not have found out by the exercise of ordinary care, and was not warned by defendant or its employees, who knew or ought, in the exercise of reasonable diligence, to have known thereof, and if the jury believe from the evidence such to have been the fact, was not one of the ordinary risks assumed by plaintiff by virtue of his employment, and if he was injured thereby, and was free from contributory negligence himself, they must find for the plaintiff, unless they further believe that said danger was so obvious and plain that plaintiff, considering his age and experience, must be presumed to have been aware of said danger."

The specific objection to this instruction is to the incorporation therein of the words, "or its employees." If the plaintiff had knowledge, no matter how that knowledge was obtained, of the vicious and dangerous nature of the mule, such knowledge would defeat his right to recover; because

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if he knew the vicious and dangerous propensities of the animal, he would be held to have assumed the risk. Therefore, an instruction, the tendency of which was to increase the plaintiff's sources of knowledge must enure to his prejudice and to the benefit of the defendant, and such was the effect of the superadded words "or its employees." So that the error, to say the least of it, is harmless, so far as the defendant is concerned.

Instruction No. 3 reads: "The court instructs the jury that defendant could not delegate to an employee, so as to relieve itself of liability for failure to comply therewith, the duty to use ordinary care to provide Charles Turner with a reasonably safe place in which to work, and reasonably safe animals and appliances to work with, and to give him such warnings and instructions as to the unusually dangerous conditions of his employment as the jury believe from the evidence his youth and inexperience, or either, made necessary, if they believe from the evidence such unusually dangerous conditions existed; and that the defendant's foreman, E. W. Thomas, in discharging or failing to discharge such duties of defendant company, was not the fellow servant of the plaintiff but a vice-principal for whose negligence, if any, the defendant is liable to plaintiff if it was the proximate cause of his injury, and he himself was free from negligence."

The crux of the objection to that instruction is to the statement, "that the defendant's foreman, E. W. Thomas, in discharging or failing to discharge such duties of defendant company was not the fellow servant of the plaintiff but a vice-principal * * *"

The rule has repeatedly been announced by this court that mere superiority in rank of a foreman put in charge of a gang of hands does not *per se* affect his relation of fellow servant to those working under him. But a different principle applies where the foreman is engaged in the discharge

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of a non-assignable duty for the master. In the latter case, he is not a fellow servant but a vice-principal. *Reid v. Medley*, 118 Va. 462, 87 S. E. 616; *Haley v. Trice*, 118 Va. 599, 88 S. E. 314, and cases cited, in which the distinction is illustrated. Subject to that test instruction No. 3 must stand or fall. In other words, if the safe appliance doctrine in the instant case imposed upon the defendant the duty of using ordinary care to furnish the plaintiff, as stable boss, with a reasonably safe mule in connection with the discharge of the duties imposed upon him by that employment, then, in essentials, the instruction is free from objection. But if the safe appliance doctrine does not apply, then Thomas and Turner were fellow servants, and the trial court did not err in setting aside the first verdict on the ground that the jury was misdirected on a material point as to the law of the case.

In the article in 26 Cyc. on Master and Servant, the authors (in discussing the safe appliance and safe place rule), after stating the general rule, at p. 1097, that "It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith * * * to do his work * * *," at p. 1113 observe: "Where the master knows or should know that an animal used by him is vicious * * *, he is liable for injuries to his servant caused thereby." Subject, of course, to the qualification that the vicious and dangerous propensities of the animal are unknown to the servant, and that he is not guilty of contributory negligence. The text is sustained by the following citations: *East Jellico Coal Co. v. Stewart*, 24 Ky. Law Rep. 420, 68 S. W. 624; *McCready v. Stepp*, 104 Mo. App. 340, 78 S. W. 671; *George H. Hammond Co. v. Johnson*, 38 Neb. 244, 56 N. W. 967; *Knickerbocker Ice Co. v. Finn*, 80 Fed. 483, 25 C. C. A. 579.

In *Arkansas Smokeless Coal Co. v. Pippins*, 92 Ark. 138, 122 S. W. 113, 19 Ann. Cas. 861, the court quotes with ap-

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proval from 26 Cyc., *supra*, and from 4 Thompson on Negligence, sec. 404, as follows: "But if a master furnishes for the use of the servant a horse or other animal of such a vicious nature that the servant is liable to be injured in consequence of its viciousness, the master will be liable if he knew, or by the exercise of ordinary care could have known, of the vicious propensities of the animal, unless the servant knew that the animal was dangerous, but nevertheless continued to use it, in which case he assumes the risk of injury from it." See also 1 Labatt, Master & Servant, sec. 206.

In *Manufacturers' Fuel Co. v. White*, 130 Ill. App. 29, the vicious nature of the mule was shown to have been known to the company's boss driver, and it was held liable to an employee, seventeen years old, who was kicked by a mule that he had driven before.

In *Sloss-Sheffield Steel, &c., Co. v. Long*, 169 Ala. 337, 53 So. 910, Ann. Cas. 1912 B, 564, it was held that an employer was as much bound to furnish safe mules to operate its coal cars as to furnish safe tools; and that an employer who ordered his employee to hitch an unsafe mule, knowing that it was unsafe, or without exercising ordinary care to ascertain if it were safe, is liable at common law for injuries to the employee resulting from the dangerous character of the mule.

In *Stutzke v. Consumers' Ice and Fuel Co.*, 156 Mo. App. 1, 136 S. W. 243, where the plaintiff, who was driving for the defendant, was kicked by a mule in the stable while he was hanging up a collar on a peg after unharnessing him, the court said: "Plaintiff did not assume the risk of being injured through the defendant's negligence in knowingly and without warning furnishing a dangerous mule, he being ignorant of its character. It may be, as defendant argues, that mules, as a class, are dangerous, or 'apt' to kick; * * * At least, defendant should have exercised ordinary care to

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furnish one not more dangerous than the usual run of mules. * * * It is probable that, if his master had not neglected to warn him that the mule he was working by was a lurking devil, he would have kept the vigilant watch which defendant now insists he should have kept."

To the same effect are the following cases: *Berenson v. Butcher*, 209 Mass. 208, 95 N. E. 220; *Scanlon v. Kavanaugh*, 210 Mass. 291, 96 N. E. 526; *Finley v. Conlan*, 152 App. Div. 202, 136 N. Y. Supp. 565; *Nooney v. Pacific Express Co.*, 208 Fed. 274, 125 C. C. A. 474, L. R. A. 1915B, 433.

In *Knickerbocker Ice Co. v. Finn*, *supra*, it was held that the question as to the viciousness of the animal and the defendant's knowledge were for the jury.

The foregoing cases are recent ones, and practically speak with one voice as to the liability of the owner for injuries to his employee in such circumstances as those disclosed by this record.

We are, therefore, of opinion that the circuit court erred in setting aside the first verdict, for which error its judgment must be reversed, and judgment will be entered for the plaintiff upon the original verdict, in accordance with the statute.

Reversed.

Mythenville.

VIRGINIA RAILWAY AND POWER COMPANY V. ARNOLD.

June 14, 1917.

Absent, Burks, J.*

1. **STREET RAILWAYS—Contract of Carriage—Relationship of Passenger and Carrier—Implied Contract.**—The relation of passenger and carrier is one of contract. It differs, however, from a contract in the ordinary relations of parties to each other, in that it is a contract which a common carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirements entitling him to ask of it the service of carriage and he does in fact ask it. The law in such case imposes the duty upon the carrier to render the service, and, under proper circumstances, the law will imply the existence of a contract of carriage.
2. **STREET RAILWAYS—Contract of Carriage—Relationship of Passenger and Carrier—Meeting of Minds.**—The conscious acceptance by the motorman or conductor of a car of the offer of a would-be passenger to become a passenger—i. e., the actual meeting of minds of passenger and carrier in fact upon a contract of carriage—is not essential to the relationship of carrier and passenger.
3. **STREET RAILWAYS—Relationship of Passenger and Carrier—Implied Contract.**—The act of a carrier in stopping a street car, or in bringing it almost to a stop at a place where it is accustomed to receive or discharge passengers, is an implied invitation by the carrier to a would-be passenger to get aboard, regardless of the motive or mental attitude of the employee controlling the movement of the car, and an acceptance by a would-be passenger of this implied invitation, creates the relationship of carrier and passenger. The law under such circumstances implies the contract of carriage.
4. **STREET RAILWAYS—Relationship of Passenger and Carrier—Implied Contract.**—In a case where the servant of the defendant in charge of the movement of the car does not in fact see the intending passenger, and is not in fact aware that he wishes

*Case submitted before Judge Burks took his seat.

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to become a passenger, the situation must be such that in the exercise of ordinary care in the discharge of its duty as a common carrier the defendant through such employee ought to have seen him or have been aware that he wished to become a passenger, before the law will imply the contract of carriage.

5. *STREET RAILWAYS—Contributory Negligence—Boarding or Alighting from Moving Street Car—Proximate Cause.*—It is not negligence *per se* to alight from a slowly moving street car. The same legal rule applies to the boarding of a slowly moving street car. In both cases the act of a person injured by the attempt to alight from or board a moving car would be the immediate cause of the injury. But the general doctrine of the law of negligence is that where a cause which results in injury to a person is set in motion by another, that other will be liable to the person injured, although the intervening act or omission of such person was the immediate cause of his receiving the injury, provided the circumstances surrounding him are such that his act or omission ought not to be imputed to him as a fault, *i. e.*, where the latter act or omission occurs in the exercise of ordinary care by the person injured. That is to say, the general doctrine of the law of negligence is, that the act or omission of the person injured, if it occurs in the exercise of ordinary care on the part of the latter, cannot be regarded as the proximate cause of the injury. Certainly this doctrine is applicable to the conduct of passengers boarding or alighting from slowly moving street railway cars under the rule above mentioned. Under it, where the car being in motion is due to the negligence of another and contact with it causes the injury, the question of fact is, whether the act of the person injured, in attempting to board a slowly moving car, was one of ordinary care. If so, such act cannot be considered as the proximate cause of the injury.

Error to a judgment of the Law and Equity Court of the city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

Statement.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

The plaintiff in error was the defendant in the court below and will be hereinafter referred to as "defendant." The defendant in error was the plaintiff in the court below and will be hereinafter referred to as "plaintiff."

This case is one of personal injury of the plaintiff occasioned while he was in the act of boarding a street car—either moving or moving the instant after plaintiff caught hold of and placed one foot on its step.

There was a verdict and judgment for the plaintiff in the court below. There were certain exceptions then taken by the defendant to the action of the court with respect to instructions and a motion to set aside the verdict as contrary to the law and the evidence.

We must therefore ascertain the facts in the case as if it were before us upon demurrer to the evidence by the defendant. So regarding the evidence the material facts are as follows:

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The accident occurred on Venable or Q street, where there are two street railway car tracks. Owing to the narrow width of the street, there is not a great deal of room between a passing car and a horse and vehicle which may be standing on the side of the street. About 8 o'clock of the morning of the accident there was a wagon drawn by one horse standing on the north side of said street, the horse facing west, its head being on the "near side" of Twenty-sixth street, to a car going west, about the usual distance from the northeast corner of Venable and Twenty-sixth streets, where passengers for west-bound street cars of defendant were accustomed to get aboard—the rear of the wagon being somewhat east of such usual place for

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passengers to board such cars. As the wagon stood it would have been "pretty near" any west-bound passing car.

The car of defendant, from which the plaintiff received his injuries, was west-bound—a pay-as-you-enter car—with its entrance at the rear.

At the time mentioned the plaintiff was walking on the north side of Venable street from the corner of Twenty-fifth street and Venable towards Twenty-sixth street corner, expecting to board the first car going west. As, walking along the sidewalk, he approached the northeast corner of Twenty-sixth street, he saw a car running at a "pretty good" speed coming west, when it was about Thirtieth street, that is, about four blocks away. Plaintiff thereupon walked out in the street to the rear of the wagon—looked at the distance the car was from him—concluded that the car would likely fail to stop with its entrance sufficiently east of the wagon to permit him to board it and as the wagon was pretty close to the car track, he decided that he had better get on the west side of the wagon. He thereupon walked on to the west bound car track past the wagon and horse, to the horse's head and stood there "out near the track." The car was then about Twenty-ninth street, about three blocks away. What immediately occurred thereafter was, in the language of the plaintiff, as follows:

"When the car got very near half way of the square, I had a lunch in my hand wrapped in newspaper, and I waved to the motorman like that (indicating). He was looking straight at me. I waved him to stop the car, and the car came up very slowly, ran past the wagon, and, as it got to me, it practically stopped. I reached out with my hand and got one foot and one hand on the car, and, just as I did, the car gave a very sudden and violent lurch forward. My foot that was on the step slipped back off again, and I was dragged that way. I heard the conductor give one bell, but the car continued to speed up and ran faster,

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and, after it passed on the west side of Twenty-sixth street on Q; I felt my leg give a snap or pop where it was doubled underneath the car. The conductor then, when I got very near half way of the square, put his hand on me. He said, 'Brother, do you want to get on this car?' I said, 'No, brother, I want to get off. You have crippled me up; stop the car and let me get off.' He ran down to within one car length of Twenty-fifth street, Johnson's box factory, so the middle part of the car was even with the door of Johnson's box factory. They carried me in diagonally to the box factory and phoned for the ambulance. That, gentlemen, is a true story, so help me God, so far as I know."

Q. Where did you wave to the motorman?

A. Didn't wave to him until he got half way of the block. I waved with my lunch.

Q. How did you wave?

A. Just like that, the ordinary way (indicating).

Q. Did the car begin to slow down apparently in response to your wave?

A. Yes, sir, started to slow down.

Q. Did it continue to slow down until the time you caught hold of the dividing rod?

A. Yes, sir.

Q. Did the car come to a stop or was it still running when you stepped onto it?

A. It came to a stop as near as I can remember, Mr. Cabell. I will not swear it came to a dead stop, but it came practically to a stop as a car with no ladies to get on generally comes to a stop for a man to get on, and I thought in the next two or three feet it would come to a stop. I think it came to a stop, but, if it was moving at all, it was not any more than a snail could go.

Q. Did you get your feet on the step?

A. Yes, sir.

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There is a conflict in the testimony as to the manner in which the plaintiff gave the stop signal. The motorman on the car—a witness for defendant—testified that, from the time that his car was one block away from him until it passed plaintiff, he saw the latter, standing at the horse's head—thought plaintiff was the driver of the wagon and not a would-be passenger—did not see plaintiff make any stop signal—that as the car drew near the wagon witness slowed it down because he was in doubt whether it could pass the wagon without colliding with it—that plaintiff stooped and looked to see if the car could pass the wagon as the car came near the wagon, “going very slow,” and at this time plaintiff motioned with one hand, indicating that the car could “come on,” and witness heard the plaintiff say “come on”; that thereupon witness himself also seeing that the car could pass the wagon, fed his current up the usual way, a point at a time, gradually increasing the speed of the car; that two or three points would have caused the car “to snatch or jerk” which it did not do.

Plaintiff testified that he did not stoop, or look to see if the car could pass the wagon, and that he made no motion with his hand, or signal, indicating that the car could “come on,” nor say “come on”; that the only signal he made was the stop signal aforesaid.

As to the speed of the car when the plaintiff attempted to get aboard of it, the testimony is conflicting.

The testimony of the plaintiff is noted above. That of his other witnesses on this point is to the effect that the car had stopped, or practically so, when he took hold of it and placed one foot on its entrance step. The testimony for defendant is that it was moving at the rate of five or six miles an hour at that time.

SUMMARY OF THE FACTS.

Regarding the evidence under the rule above referred to, the facts bearing on the questions presented to us for our decision, may be summarized as follows:

1. There was in fact no express contract of carriage of plaintiff as a passenger.

2. As bearing on whether there was such an implied contract the facts are as follows:

The plaintiff at the proper place, gave the proper signal, indicating his desire to become a passenger, and so gave the signal that it was negligence on the part of defendant not to have seen it (through its motorman). The defendant, nevertheless, did not see the signal. However, for another cause, it slowed down its car immediately following the signal in a manner which induced the plaintiff reasonably to conclude that it was going to stop in response to his signal, and he did so conclude, and acted upon that conclusion, in his attempt to board the car.

3. The car was decreasing in its motion and had come practically to a stand-still at the moment plaintiff attempted to board it.

A. B. Guigon, H. W. Anderson, Thos. P. Bryan and T. Justin Moore, for the plaintiff in error.

Cabell, Garnett & Cabell, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

There are only two questions raised by the assignment of error and presented to us for decision, namely:

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1. Whether a meeting of the minds of defendant and plaintiff *in fact* upon a contract of carriage of the plaintiff as a passenger is essential to the recovery of the plaintiff?

2. Whether the plaintiff is entitled to recover any damages—although the defendant was negligent in not bringing its car to a stand-still—and although it was moving so slowly that the plaintiff was guilty of no negligence in attempting to board it, if the plaintiff in fact attempted to board the car while it was moving, his own act, in coming in contact with the moving car, being the proximate cause of his injury (as defendant contends)?

As these questions involve well-settled propositions of law, we do not feel that any extended discussion of the authorities is necessary.

We will consider such questions in their order as stated above.

1. With respect to the first question:

It is true, the relation of passenger and carrier is one of contract. It differs, however, from a contract in the ordinary relations of parties to each other, in that it is a contract which a common carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirements entitling him to ask of it the service of carriage and he does in fact ask it. The law in such case imposes the duty upon the carrier to render the service, and, under proper circumstances, the law will imply the existence of a contract of carriage.

The conscious acceptance by the motorman or conductor of the car of the offer of a would-be passenger to become a passenger—*i. e.*, the actual meeting of minds of plaintiff and defendant in fact upon a contract of carriage—it is well settled, is not essential to the relationship of carrier and passenger. *Conner v. Citizens' Street Railway Co.* (1885), 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 179; *Marshall's Adm'r*

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v. *Boston Elevated Ry. Co.* (1909), 203 Mass. 40; 88 N. E. 1094; *Ormand v. St. Louis Transit Co.*, 102 Mo. App. 207, 76 S. W. 680; 2 *Hutchison on Carriers* (3rd ed.) 1906, sec. 997; *Klinck v. Chicago City Railway Co.*, 262 Ill. 280, 104 N. E. 669, 52 L. R. A. (N. S.) 70, 73, Ann. Cas. 1915 B, 177; *Nellis on Street Railways*, sec. 301, p. 600.

The usual position taken by the authorities on the subject is that the act of a carrier in stopping a street car, or in bringing it almost to a stop at a place where it is accustomed to receive or discharge passengers, is an implied invitation by the carrier to a would-be passenger to get aboard, regardless of the motive or mental attitude of the employee controlling the movement of the car, and an acceptance by a would-be passenger of this implied invitation, creates the relationship of carrier and passenger. The law under such circumstances implies the contract of carriage.

In the case of *Klinck v. Chicago City Railway Co.*, *supra*, the court said:

"As *Klinck* was standing at a place where defendant was accustomed to receive and discharge passengers, for the purpose of boarding the car, and as the speed of the car was reduced as it approached him, apparently for the purpose of receiving and discharging passengers, the relation of passenger and carrier existed between him and plaintiff in error when he attempted to board the car and was injured. * * *

"The instruction, as offered, is clearly wrong. It would have required the plaintiff to prove that the employees in charge of the car knew that he intended to board the car. While it is necessary to prove either an express or implied contract of carriage, yet the act of the carrier in stopping a street car, or in bringing it almost to a stop at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take pas-

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sage thereon at that place to board the car and the act of any such person in attempting to board the car is an acceptance of the implied invitation, and creates the relation of carrier and passenger. It was the duty of those in charge of the car to know whether or not the implied invitation was accepted, and the carrier cannot escape liability by showing that its employees in charge of the car did not know that the person who had accepted the implied invitation intended to board the car."

It is true that in a case where the servant of the defendant in charge of the movement of the car does not in fact see the intending passenger, and is not in fact aware that he wishes to become a passenger, the situation must be such that in the exercise of ordinary care in the discharge of its duty as a common carrier the defendant through such employee ought to have seen him or have been aware that he wished to become a passenger, before the law will imply the contract of carriage. Such was the case at bar, however, as we must regard it under the rule governing us.

The note of Judge Freeman, 104 Am. St. Rep. 586, cited by counsel for defendant is not in conflict but in accord with this position.

The question under consideration was not involved in the case of *Reynolds v. Richmond, etc., Ry. Co.*, 92 Va. 400, 23 S. E. 700, cited and relied on by counsel for defendant. In that case the intending passenger was not at the usual place for taking or discharging passengers and hence had not brought himself within the requirements entitling him to ask of the carrier the service of carriage.

The remaining authorities cited by counsel for defendant on this point are distinguishable from the instant case. For the most part they are cases where the situation was such that the employees in charge of the movement of the defendant's car in the exercise of ordinary care were not to be expected to become aware of the situation of the

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plaintiff, such as that the latter was not at the usual stopping place for passengers to board or alight from defendant's cars, or other situations in which no duty arose upon the part of the carrier to use care to become aware of the position of the plaintiff. It is not believed therefore that a detailed discussion of such authorities would serve any useful purpose.

2. With respect to the second question.

Since the decision of the case of *City of Newport News, &c. v. McCormick*, 106 Va. 517, 56 S. E. 281, by this court, it has been the settled rule in this State that it is not negligence *per se* to alight from a slowly moving street car. The same legal rule applies to the *boarding* of a slowly moving street car. In both cases the act of a person injured by the attempt to alight from or board a moving car would be the immediate cause of the injury. But the general doctrine of the law of negligence is that where a cause "which results in injury to a person is set in motion by another, that other will be liable to the person injured although the intervening act or omission of such person was the immediate cause of his receiving the injury, provided the circumstances surrounding him are such that his act or omission ought not to be imputed to him as a fault" (1 Thompson on Neg., sec. 64),—*i. e.*, where the latter act or omission occurs in the exercise of ordinary care by the person injured. That is to say, the general doctrine of the law of negligence is, that the act or omission of the person injured, if it occurs in the exercise of ordinary care on the part of the latter, cannot be regarded as the proximate cause of the injury. Certainly this doctrine is applicable to the conduct of passengers boarding or alighting from slowly moving street railway cars under the rule in this State above mentioned. Under it, where the car being in motion is due to the negligence of another and contact with it causes the injury, the question of fact is, whether the act of the person injured,

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in attempting to board a slowly moving car, was one of ordinary care. If so, such act cannot be considered as the proximate cause of the injury.

Counsel for defendant contend that although it were granted that the defendant was negligent in not stopping its car, and although the plaintiff was not negligent *per se*, or at all,—but was in the exercise of ordinary care when he attempted to board the slowly moving car, yet, if injured in so doing, such act was the proximate cause of the plaintiff's injury and hence he cannot recover. As we have seen above, such position confuses immediate cause with proximate cause. Therefore, it cannot be sustained upon principle. Nor can it be sustained upon authority, where the rule is in force which is in force in Virginia applicable to moving street car cases. Such a position could not be tenable without overturning the settled rule on the subject in this State.

Counsel for defendants cite, rely upon and quote from a paragraph in the majority opinion of this court delivered by its able and learned president, Judge Keith, in the case of *C. & O. Ry. Co. v. Paris*, 111 Va. 41, at pp. 49 and 50, 68 S. E. 398, 28 L. R. A. (N. S.) 773, to sustain the position in question. It is quite true that if what is there said were carried to its logical conclusion and were applicable to the instant case, it would sustain the position of counsel and necessitate our overruling the case of *Newport News, &c., Co. v. McCormick*, *supra*. But aside from the question as to whether it was necessary for the decision of that case (a consideration of which it is unnecessary for us to here enter upon) what was there said was in reference to the facts of that case; and, in view of our opinion of the soundness of the principle on which the rule established in *New-*

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port News, &c., Co. v. McCormick, supra, is based, it is sufficient for us to say that we cannot apply to the instant case the said citation relied on by counsel for defendant.

For the foregoing reasons we find no error in the judgment complained of and it will be affirmed.

Affirmed.

Mythenville.

WALKER V. THE GATEWAY MILLING COMPANY.

June 14, 1917.

Absent, Whittle, P. and Burks, J.*

1. **SALES—Rejection by Buyer—Evidence.**—Defendant purchased of plaintiff fifteen cars of a commodity designated in the written order therefor as “Winter Wheat Bran.” Defendant refused to accept eight of the cars, contending that he was entitled to bran without screenings. It was conceded that the bran delivered by plaintiff contained a certain percentage of screenings, but plaintiff contended that, under the custom and usage of the business, the expression “Winter Wheat Bran,” as understood by both parties to the contract, designated a commodity which carried such screenings as were contained in the bran shipped by it to defendant. It was held that the following considerations bearing upon the legal effect of defendant’s belated refusal of a part of the bran, after using nearly half of it, were properly submitted to the jury, under correct instructions from the court, first, that in his telegram rejecting the bran, defendant did not mention screenings, and that the evidence as a whole failed to show that the presence of screenings was, in fact, the subject or cause of any fault found with the bran before it was rejected; and secondly, that there was evidence tending to show that defendant overstocked himself in anticipation of a large contract for feeding horses which he failed to get.
2. **USAGES AND CUSTOMS—Parol Evidence—Interpretation and Construction.**—The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence.

*Case submitted before Judge Burks took his seat.

Syllabus.

3. **CONTRACTS—Usages and Customs.**—A usage or custom of either a trade or a locality, which would otherwise form a part of a transaction will equally form a part when the transaction has been embodied in a writing unless the terms of the writing clearly exclude the usage or custom; and the application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service.
4. **SALES—Usages and Customs—Federal Statutes Against Adulteration.**—Plaintiff sold defendant a commodity designated in the contract as "Winter Wheat Bran." In an action by plaintiff against defendant for failure to accept the bran, evidence that under the usage or custom of the trade "Winter Wheat Bran" contained a certain percentage of screenings, did not contravene the provisions of the State and Federal statutes against the adulteration and misbranding of commercial feeding stuffs, it not being claimed that the screenings in the bran constituted an unlawful adulteration, nor that the tags which were in fact placed on the sacks, indicating the presence of screenings, constituted a misbranding. There is nothing in the statutes, State or Federal, to in any way interfere with the rules of evidence in cases where parties have employed trade terms having a definite meaning, even though these statutes require that meaning to be fully defined in the stamps placed on the goods.
5. **USAGES AND CUSTOMS—Appeal and Error—Conclusiveness of Verdict.**—Defendant contended that he had no actual knowledge of the custom or usage of the trade in question, and that it was not sufficiently certain and notorious to give rise to a presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal.
6. **CONTRACTS—Interpretation and Construction—Surrounding Circumstances.**—It is entirely proper to permit the jury to consider the situation of the parties and the circumstances leading up to the making of the contract for the purpose of determining whether a usage of trade operated upon the minds of the parties in using the language which was employed in the contract.
7. **CONTRACTS—Interpretation and Construction—Questions of Law and Fact.**—Where the true meaning of the terms of a contract depended upon controverted facts and conflicting evidence, the question was one for the jury, upon proper instructions, to determine.

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8. SALES—*Resale—Notice of Time and Place to Buy.*—Where upon a breach of contract of sale by a purchaser, he was notified that the subject of the sale would be resold at his risk, there is no rule of law requiring that he should be given notice of the time and place of sale.

Error to a judgment of the Corporation Court of the city of Newport News, in a proceeding by motion for a judgment for money. Verdict for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

J. W. Read and Lett & Massie, for the plaintiff in error.

Nelms, Colonna & McMurran and A. D. Jones, for the defendant in error.

KELLY, J., delivered the opinion of the court.

About the middle of January, 1915, H. B. Walker, of Newport News, purchased from The Gateway Milling Company, of Kansas City, through a Suffolk brokerage firm, fifteen cars of a commodity designated in the written order therefor as "Winter Wheat Bran." Rush shipments were requested by Walker, and the cars were all in Newport News by February 9, 1916. The bills of lading for these cars, with drafts attached, were forwarded to a Newport News bank. On March 2, 1916, after Walker had taken up the drafts and bills of lading for six of the cars and disposed of the same to a customer, he sent the following telegram to the Gateway Milling Company: "Unloaded six cars bran find other cars promiscuous shipments not uniform grade. Shipped by different mills not like sample several cars unable use, two cars transferred

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in transit and bags torn up wire disposition of cars not according to sample and cars containing torn sacks."

Some days later, about March 12th, Walker took up one more draft and applied the car thus secured in completing a contract which he had previously made with the purchaser to whom he had sold the other cars; but with the exception of this car he stood upon his rejection of the remaining portion of the shipment.

Immediately upon receipt of the telegram above quoted, the Milling Company took up the matter of disposing of the rejected cars to the best advantage, apparently using every effort to this end, including an unsuccessful attempt to induce Walker to complete the contract, with the final result that a sale was made early in April to P. W. Hiden, the same party to whom Walker had sold the seven cars which he had accepted and paid for. This sale, however, was made at considerably less than the contract price.

Thereupon, this proceeding by motion was instituted to recover the loss thus sustained by the vendor, and there was a verdict and judgment against Walker which he brings here upon a writ of error.

The controversy hinges upon the proper interpretation to be given to the words "Winter Wheat Bran," as used in the contract between the parties. It is conceded that the bran contained a certain percentage of screenings. Walker's contention is that he was entitled to bran without screenings, and the Milling Company contends that, under the custom and usage of the business, the expression "Winter Wheat Bran," as understood by both parties to the contract, designated a commodity which carried such screenings as were contained in the bran shipped by it to Walker.

A circumstance which, perhaps, had considerable weight with the jury, and which was properly before them under correct instructions from the court, was that in his tele-

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gram of March 2nd rejecting the bran, Walker did not mention screenings, and that the evidence as a whole fails to show that the presence of screenings was, in fact, the subject or cause of any fault found with the bran before it was rejected. There was evidence tending to show that Walker over-stocked himself in anticipation of a large contract for feeding horses which he failed to get. These and other considerations bearing upon the legal effect of Walker's belated refusal of a part of the bran, after using nearly half of it, were properly submitted to the jury. Their verdict for the plaintiff renders it unnecessary for us to determine whether, under the evidence, and, as claimed by plaintiff, these considerations were sufficient as a matter of law to cut off any defense.

The principal assignment of error, to quote from the petition, is "that the court erred in admitting evidence of custom to contradict, vary and add to the written agreement between the parties."

This assignment proceeds upon a misconception of the rule against the use of parol evidence to contradict or vary the terms of a written contract. The evidence which the court permitted to go to the jury with reference to the usage and custom of the trade was not designed to vary or contradict the contract, but to interpret certain terms used therein which, under the plaintiff's theory and contention, had an accepted and established trade meaning, not contradictory of but entirely consistent with the contract. For such a purpose resort may always be had to parol evidence.

"The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. * * * And this admission of evidence as to usage is not inconsistent

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with the general rule that a written contract is not to be contradicted or varied by parol evidence." Elliott on Contracts, Sec. 1707.

"There are cases where usage is admissible to show the meaning of words which are used in a sense different from their ordinary meaning. This occurs where, by some usage of trade, words have acquired a peculiar meaning distinct from the popular meaning of the same words, or where the context evidently shows that they must be understood in some other special and peculiar sense. Under this rule, evidence is admissible to explain the meaning but not to contradict an instrument, and this, though no ambiguity exists on the face of the instrument. 'Such evidence is received on the theory that the parties knew of the usage or custom and contracted in reference to it, and in such cases the evidence does not add to or contradict the language used, but simply interprets and explains its meaning.'" Elliott on Contracts, sec. 1723.

In the case of *Richlands Co. v. Hildebeitel*, 92 Va. 91, 94, 22 S. E. 806, 807, Judge Riely, speaking for this court, used the following language:

"'Extrinsic evidence' it is said in Browne on Parol Evidence, sec. 57, 'is admissible in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use, and this whether the phrases or terms are in themselves apparently ambiguous or not.' And again it is stated in the same work (p. 216) that 'parol evidence is competent to annex to a contract a custom or usage of the business and locality, known to the parties, or so general and well settled as to be presumed to be known to them, and with reference to which they must be deemed to have contracted.'"

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The case of *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612, is much in point. In that case the court said:

"Appellant insists that there was a contract between the parties in this case which was entirely clear and free from ambiguities, not subject to be varied by parol proof of custom or usage alleged to have existed in such business, and that, therefore, it was not proper for the appellees in their complaint to allege and by their evidence to prove, a usage intended to be explanatory of the language of the appellant's order. Common terms, however, may in a particular business or trade, acquire a peculiar and different signification from that generally given to them. It is perfectly well settled that, when parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to the usages of that business or trade, and their contracts are to be interpreted consistently with such usage, unless by the express terms of the contract, the usage is excluded or is inconsistent with the contract * * *

"Contracts of the kind here involved may, on their face, seem clear, but in the particular instance, in connection with the business to which they pertain, be ambiguous. * * * In *Soutier v. Kellerman*, 18 Mo. 509, the contract called for the sale of shingles at a certain price per thousand, a perfectly clear expression ordinarily and abstractly considered, yet it was held competent to show that by the usage of the business, two bunches of shingles of certain dimensions, regardless of the number of shingles actually contained in the bunches, constituted a thousand, and that a delivery upon such a basis was within the terms of the contract."

The authorities to the foregoing effect are overwhelming. See *Richmond v. Barry*, 109 Va. 274, 281, 63 S. E. 1074; *Board of Trustees v. Bruner*, 175 Ill. 307, 51 N. E. 687; *Wood v. Allen*, 111 Iowa, 97, 82 N. W. 451; *Gosler*

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v. *Eagle Sugar Refinery*, 103 Mass. 331; *Snoqualmi Co. v. Moynihan*, 179 Mo. 629, 78 S. W. 1014; 12 Cyc. 1081 *et seq.*; 4 Wigmore on Evidence, sec. 2440.

We shall not attempt to review the authorities cited for the plaintiff in error in support of the objection to the evidence in question. They are not in conflict with the views here expressed, but are not applicable to the facts of this case. There can be no doubt as to the rule that a usage or custom of either a trade or a locality, which would otherwise form a part of a transaction will equally form a part when the transaction has been embodied in a writing unless the terms of the writing clearly exclude the usage or custom; and, as said by Professor Wigmore (Vol. 4, sec. 2440), "the application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service." In the instant case, we are of opinion that the trial court properly applied the rule.

But it is contended that the custom or usage invoked to determine the meaning of Winter Wheat Bran, as used in the contract, contravenes the provisions of the State and Federal statutes against the adulteration and misbranding of commercial feeding stuffs, and that for this reason the evidence of the custom or usage should have been excluded. There is, we think, no force in this position. It is not claimed that the screenings in this bran constituted an unlawful adulteration, nor that the tags which were in fact placed on the sacks, indicating the presence of screenings, constituted a misbranding. Conceding that the sale could not have been consummated in compliance with the State and Federal law without using tags or brands indicating the percentage of screenings contained in the bran there was nothing wrong or contrary to the law in selling the identical bran which was sold, assuming, as we may properly assume under the evidence and the finding of the

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jury, that the parties understood the term Winter Wheat Bran to mean the commodity which was actually shipped. There is nothing in the statutes, State or Federal, to in any way interfere with the rules of evidence in cases where parties have employed trade terms having a definite meaning, even though these statutes require that meaning to be fully defined in the stamps placed on the goods. Whether Winter Wheat Bran would have been a sufficient designation of the wheat within the meaning of the statutory law is one question, and an immaterial one in this case. Whether Walker, as a dealer in commercial feeding stuff, in ordering Winter Wheat Bran from another dealer, must be held, under a general, long established and notorious custom of the trade, to have contracted for bran with screenings, is another and, in this case, a controlling question, which was submitted to the jury upon proper instructions and found against him.

It is further insisted that the defendant Walker had no actual knowledge of the custom or usage of the trade, and that it was not sufficiently certain, general and notorious to give rise to a presumption of knowledge on his part. In answer to this contention, it is only necessary to say that there was evidence tending to support the contrary view, and the verdict of the jury settled the question against the defendant.

The second assignment of error challenges the action of the court in giving Instruction No. 1, which was as follows:

"The court instructs the jury that in determining the intention with which the words 'Winter Wheat Bran' were employed by the parties to the contract in question, they may consider the circumstances under which the contract was entered into, including the negotiations leading up to it, the situation and business of the parties, and the usage of the dealers in feed stuffs that prevailed in the

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city of Newport News at the date of the contract, if shown; and if the jury believe from the evidence that among dealers in bran in this city, including the defendant, it is understood that 'Winter Wheat Bran' contains a percentage of screenings, that then if the bran tendered the defendant was as good as the average Winter Wheat Bran sold on this market, and that this was the commodity contemplated by the parties to the contract, they will find for the plaintiff, and assess damages under other instructions herein."

The chief objection urged against this instruction is based upon the fact that it permits the jury to consider the usage of the trade in determining the meaning of the contract, and this has already been disposed of in discussing the first assignment of error. A second objection to the instruction is that it permits the jury to consider the circumstances under which the contract was entered into, including the negotiations leading up to it. It was, in our opinion, however, entirely proper to permit the jury to consider the situation of the parties and the circumstances leading up to the making of the contract for the purpose of determining whether the usage in question operated upon the minds of the parties in using the language which was employed in the contract.

"Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described." 3 Jones Com. on Evidence, sec. 453. See also to same effect 9 Cyc. 587-8; 17 Cyc. 670; 10 R. C. L. p.

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1041, sec. 235; *Richardson v. Planters' Bank*, 94 Va. 130, 137, 26 S. E. 413; *Stephens Digest*, Virginia Addition, 614, 615.

The true meaning of the terms of the contract depend upon controverted facts and conflicting evidence, and the question was, therefore, one for the jury, upon proper instructions, to determine. *Camp v. Wilson*, 97 Va. 265, 270, 33 S. E. 591; *Strause v. Richmond, &c., Co.*, 109 Va. 724, 729, 730, 65 S. E. 659, 132 Am. St. Rep. 937.

Nor do we think there is any force in the further objection urged against this instruction "that the fact that the commodity was as good as the average sold on this market would not be a fulfillment of the contract in controversy." Taking the instruction as a whole it is perfectly clear that this language therein was merely intended to explain to the jury that they were to determine from all the facts and circumstances in the case whether "Winter Wheat Bran" meant the commodity which was actually shipped to the defendant.

There were numerous other assignments of error, all subordinate to those already discussed, and all in our opinion, upon due consideration, without merit. We deem it unnecessary to enter into a discussion of any of them, further than to advert briefly to that phase of the fourteenth assignment which asserts that the verdict was contrary to the law and the evidence because, as plaintiff in error alleges, the subsequent sale of the rejected cars by The Gateway Milling Company was made unfairly and without any notice of the time and place to the defendant. So far as the unfairness of the sale is concerned, the evidence does not justify the charge. It is not too much to say that the record shows conclusively that after receiving the notice of rejection the Milling Company exercised every reasonable effort to make the best disposition possible of the bran. An earnest effort was made also to convince

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Walker that he had not only gotten what he paid for but that he had received a commodity which was in itself as good as the best of its kind; that the market price therefor had increased since his purchase, and that it would be to his best interest to complete the contract. He declined to listen to these arguments and stood on his rejection. He was notified that the stuff would be sold at his risk, and there was no rule of law requiring that he should be given notice of the time and place of the sale. *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 463, 44 S. E. 705, and authorities there cited.

If the fact that the rejected bran finally sold for less than the contract price can be considered sufficiently material, as tending to warrant the course of the plaintiff in error, to call for any explanation, the explanation is not far to seek. His own conduct in refusing to accept it naturally and necessarily placed it at a disadvantage on the market. Besides, it had remained for weeks on the railroad yards and was subject to heavy demurrage charges, which any purchaser would have had to pay unless, as happened in *Hiden's Case*, he could use the bran for export purposes and thus remove the shipment from the influence of the demurrage rules.

We are of opinion that the judgment complained of is without error and it will be affirmed.

Affirmed.

Syllabus.

Mytherville.

WASHINGTON-VIRGINIA RAILWAY COMPANY V. FISHER.

June 14, 1917.

Absent, Burks, J.

1. CROSSINGS—*Private Crossings—Liability of Railroad to Public.*—

A crossing was constructed by a railroad company on the request of the landowner, whose property was intersected by the railroad, under section 1294-b, Code of 1904, satisfactory to the landowner, smooth and level over its entire width and fully up to the average crossing. No demand was made on the company that it should be *forty feet* wide, and it was put in, strictly according to the agreement.

Held: That the crossing was a private one. The statute measures the extent and obligation of the railroad with respect to it. The duty is owing to the landowner, and when that duty has been discharged according to statutory requirement and is satisfactory to him, no one else can be heard to complain. The general public are not interested. The rights and remedies provided by section 1294-b are personal to the landowner, and if the public wish to acquire other or greater rights their remedy is under different statutes and by an essentially different procedure. If then a person other than the owner, or some one in privity with him, for his own convenience, elects to use such crossing and mishap befalls him, the company, in the absence of some further intervention on its part that proximately contributes to the accident, cannot be held liable therefor.

2. STREETS AND HIGHWAYS—*Acknowledgment and Recordation of Map—Acceptance.*—Upon the acknowledgment and recordation of a plat, the "Map Act" (Code 1904, section 2510-a), creates a public easement or right of passage over such portions of the premises as are set apart for streets; yet such streets do not become "county roads or highways" unless and until they are accepted or established as such by the county authorities. It affirmatively appears that in the instant case the street in question has never been so accepted or estab-

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lished. Consequently, it is not "a county road or highway" in contemplation of clauses 38 and 39 of section 1294-d of Code of 1904.

3. **CROSSINGS—Duty of Railroad—"County Road or Highway."**—The word "county," as used in section 1294-d, clauses 38 and 39, Code of 1904, setting forth the duty of a railroad, crossing a "county road or highway," is used in the sense of an adjective and modifies or limits both "road" and "highway;" and from their collocation those words are the equivalent of "county road or county highway;" and a road dedicated by a plat to the public, but never accepted as such by the county authorities, is not a "county road or highway," as those terms are used in the statute.

Error to a judgment of the Circuit Court of Alexandria county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

John S. Barbour and Moore, Keith, McCandlish & Hall, for the plaintiff in error.

Crandall Mackey and F. S. Key-Smith, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This action was brought by the defendant in error, Clara G. Fisher, against the Washington-Virginia Railway Company to recover damages for personal injuries ascribed to its negligence. Judgment was rendered for the plaintiff upon a demurrer to the evidence.

The essential facts, about which there is no ground for controversy, are these: The defendant owns and operates an electric trolley line of railway from Washington, D. C., to Fairfax, Virginia, a distance of about twenty miles. In

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1895, it acquired by purchase the fee simple title to the right of way through a tract of land in Alexandria county, comprising a strip of ground sixty feet in width and four hundred and twenty feet long. Within two years thereafter, the defendant had completed its railway, and has been continuously operating it to the present time. Defendant's vendors retained the ownership of the land on both sides of the right of way for several years after the railway was put in operation, but subsequently sold to others, and by successive transfers W. W. Douglass ultimately became the sole owner.

About eight years after the completion of the railway, the owners of the land at that time recorded a dedication and plat of the property on both sides of the right of way, which they designated "West Ballston Sub-division." The plat showed the lay-out of the land in lots and streets. The dedication and plat were made in pursuance of section 2510-a of the Code. The deed of dedication described the land by metes and bounds, calling specifically for the boundary lines of the right of way strip and in terms excepted it from the operation of the dedication. Main street, one of the streets of the sub-division, was represented on the map as forty feet wide. It approaches the right of way at right angles on both sides, each section abutting on the defendant's boundary line. Two hundred and forty-seven feet west of where Main street, if extended, would cross the right of way, Church avenue, another street in the sub-division, crosses the railway for the full width of forty feet, affording a smooth and level passage and access to the defendant's station at that point. For five or six years after "West Ballston Sub-division" had been laid out there was no crossing over the defendant's right of way between the termini of Main street, and about that time Douglass, who was then the owner of the land on both sides of the railway, served a written notice on the defendant, under section 1294-b of the

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Code, to compel the company to construct "a proper and suitable wagon way" from one part of his land to the other. The defendant objected to putting in the crossing at that place, because two of its trolley poles were in the way, and for the further reason that it would involve the expense of laying two lines of terra cotta pipe across the road for necessary drainage.

Douglass gives the following account of the transaction: "I stated to the railroad company that there was ample room for them to construct a crossing east of these poles without moving them, and that if they would construct the crossing there it would be satisfactory to me * * * I told them as a compromise that I would furnish the pipe, which I did, for sewerage under the road if they would construct the crossing; and under that compromise agreement the crossing was put in." This was done in the year 1910, or 1911. It was a box, grade crossing, thirteen feet wide. A box crossing is made by putting down boards parallel with the rails on each side and filling in between the boards with earth or cinders. At right angles to and between the tracks, heavy oak timbers are placed at each side of the crossing to retain the earth or cinders used in making the fill. The height of these timbers necessarily varies according to the contour of the ground; and at the crossing in question was eleven inches on the east side and four inches on the west side. The surface of the crossing for its entire width was smooth and level, with the depressions mentioned on the outer margins. Douglass testified that the crossing was fully up to the average crossing and satisfactory to him.

The plaintiff resided in "West Ballston Sub-division," and had been living within a few hundred yards of the crossing, on the north side, for eight or nine years; and was familiar with its location and character, having frequently passed over it both in the daytime and at night.

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On the night of November 8, 1914, the plaintiff and her three daughters were returning home after attending services at a Presbyterian church on the south side of the railway, and while walking along the east side of the crossing in the dark, she stepped over the edge and fell, breaking one of the bones of her wrist.

Upon the foregoing summary of the facts, we are of opinion that the decision of the case depends upon the character of the crossing. If it is a private crossing, the judgment ought to be reversed; otherwise, upon a demurrer to the evidence, it should be affirmed.

The fact is not controverted that this crossing was constructed by the defendant on the request of Douglass, by authority of section 1294-b. The statute which enjoins upon the defendant the duty to supply the crossing measures the extent of the obligation with respect to it. The duty is not owing to the general public, but is limited to the land owner, and is discharged when the company provides a proper and suitable wagon way across the railroad, and afterwards keeps the way in good repair. In this instance, it was satisfactory to the land owner, and was smooth and level over the entire width and "fully up to the average crossing." Moreover, no demand was made on the company that it should be forty feet wide, and it "was put in strictly according to the agreement."

The liability of the company is coextensive with the duty, and is limited and measured by the duty. The duty is owing to the land owner, and when that duty has been discharged according to statutory requirement and is satisfactory to him, no one else can be heard to complain. The general public are not interested. They have suffered no inconvenience from the division of the land, and are neither benefited nor burdened by that event. They have no greater interest in respect to the land occupied by the crossing after the right of way has been established than they had

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before. The rights and remedies provided by section 1294-b are personal to the land owner, and if the public wish to acquire other or greater rights their remedy is under different statutes and by an essentially different procedure.

If then a person other than the owner, or some one in privity with him, for his own convenience, elects to use such crossing and mishap befalls him, the company, in the absence of some further intervention on its part that proximately contributes to the accident, cannot be held liable therefor.

But it is said that the rules applicable to an ordinary private crossing do not obtain in this case because the crossing constitutes the connecting link between the termini of Main street, which by operation of section 2510-a, clause 3, became a public highway when it was dedicated and platted and recorded. It is contended that such a crossing comes within the influence and is controlled by clauses 38 and 39 of section 1294-d, which develoves upon the defendant the duty to construct a crossing coincident with Main street, which, as remarked, is forty feet wide.

It is true that upon the acknowledgment and recordation of the plat, the "Map Act" creates a public easement or right of passage over such portions of the premises as are set apart for streets; yet such streets do not become "county roads or highways" unless and until they are accepted or established as such by the county authorities; and it affirmatively appears that Main street has never been so accepted or established. Consequently, it is not "a county road or highway" in contemplation of clauses 38 and 39 of section 1294-d. *Commonwealth v. Kelly*, 8 Gratt. (49 Va.) 632; *Buntin v. City of Danville*, 93 Va. 200, 24 S. E. 830; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738. It was admitted that Main street is not a "county road," because it was never accepted as such by the county authorities. Nevertheless, it was sought to be maintained that the street is a

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"highway" within the meaning of the above mentioned clauses. This attempt to dissociate "highway" from "county," as the words occur in clause 38 is not justified either by grammatical construction or the underlying reason for the provision. In the sentence in which the words "every county road or highway" are found, "county," though a noun, is used in the sense of an adjective and modifies or limits both "road" and "highway;" and from their collocation those words are the equivalent of "county road or county highway." Besides, the statute requires the county to bear its due proportion of the expense of putting in crossings to which it applies; and it is unreasonable to suppose that the legislature would impose the burden on a county of providing a crossing for a highway other than a "county highway."

For these reasons, it seems clear to us that clauses 38 and 39 do not apply to this case.

The point was also stressed that these clauses; in terms exclude "electric railways." But the fact that they do not apply to the case dispenses with the necessity of deciding that question.

The decision rests upon the construction of our own statutes, and since our attention has not been drawn to any Virginia authority directly in point, and most of the citations being to outside decisions, a review of the cases would not be helpful.

For these reasons, our opinion is to reverse the judgment of the circuit court, and enter judgment for the plaintiff in error, the Washington-Virginia Railway Company, on its demurrer to the evidence.

Reversed.

Syllabus.

Mythenville.**WATKINS, TREASURER, AND OTHERS V. BARROW AND OTHERS.**

June 14, 1917.

Absent, Burks, J.

1. **TAXATION—Constitutional Law—Uniformity—Exemption of Property in Corporate Limits from Road Tax.**—The Code of 1904, section 944-a, clause 11, as amended by act of March 15, 1915, p. 121, which provides that the board of supervisors of each county shall annually levy a road tax upon the property, subject to local taxation in their county and not within the corporate limits of any town in such county which maintains its own streets, is not in violation of section 168 of the Constitution, which provides that "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."
2. **TAXATION—County Levy.**—The words "county levy," as generally used in this State, mean the tax levied upon the property of the taxpayers of the county for the purpose of paying the general county expenses, such as the salaries of county officials, the maintenance of courthouses, and those general expenses by which all of the citizens of the county are benefited, whether they live in an incorporated town constituting a part of the county or outside of such town. And the county levy is to be distinguished from other special taxes levied by the board of supervisors for particular purposes.
3. **TAXATION—Constitutional Law—Uniformity.**—The "territorial limits of the authority levying the tax," within which the taxes, under section 168 of the Constitution of 1902, must be uniform, corresponds with the taxing districts lawfully prescribed for the peculiar benefit of which such taxes are levied and collected. Thus, while the board of supervisors has authority to impose county levies for county purposes upon all property located in the county, still under the Constitution itself (section 111) the territorial limit of its authority to levy uniform district taxes is confined to the limits of the particular magis-

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terial district for the benefit of which the taxes are imposed, and they may and do levy varying rates in different districts in the same county.

Appeal from a decree of the Circuit Court of Prince Edward county. Decree for complainants. Defendants appeal.

Affirmed.

The opinion states the case.

Meredith & Cocke and Samuel A. Anderson, for the appellants.

J. M. Crute, E. Warren Wall, and Hill Carter, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The question here involved is whether or not the authorities of the county of Prince Edward can levy and collect a county road tax for the year 1915 of the owners of real and personal property located within the corporate limits of the town of Farmville, in that county, and arises under a bill filed by certain taxpayers of the town of Farmville against the treasurer and board of supervisors of the county. The trial court adjudged the tax to be illegal and void, and enjoined its collection.

The statute under which the board of supervisors claims its authority reads thus: "The board of supervisors of each county shall annually levy along with the county levy, a road tax upon the property, real and personal, subject to local taxation in their county and not included within the corporate limits of any town in such county which main-

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tains its own streets." Code, 1904, section 944-a, clause 11, as amended by act approved March 15, 1915, Acts 1915, page 121.

It is claimed by the appellants that the language of the act quoted, which exempts taxable property in towns which maintain their own streets from county road taxes, is in violation of section 168 of the Constitution, which provides that "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

This clause of the Constitution simply makes more explicit the general doctrine of law which has already received the approval of this court in the case of *Day v. Roberts*, 101 Va. 249, 43 S. E. 362.

So far as here involved, the uniformity clauses in the Constitutions of 1869 and 1902 are substantially similar. *Moss v. Tazewell County*, 112 Va. 883, 72 S. E. 945.

A precisely similar question was decided by this court in the case of *Board of Supervisors of Washington Co. v. Saltville Land Co.*, 99 Va. 640, 39 S. E. 704. That case determined that section 2 of article 7 of the Constitution of 1869, which authorized the boards of supervisors to fix county levies, did not restrain the General Assembly from creating the town of Saltville, in Washington county, a separate taxing district, and relieving property in the town from all taxation for maintaining the county roads outside of the town, upon condition that it maintain its own streets.

Any possible confusion which may arise from a comparison of isolated expressions of this court from time to time grows out of the failure to distinguish between county levies and other special taxes levied by boards of supervisors. While, in a general sense, all such taxes are either county or district levies, at the same time the words "county

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levy," as generally used in this State, mean the tax levied upon the property of the taxpayers of the county for the purpose of paying the general county expenses, such as the salaries of county officials, the maintenance of courthouses, and those general expenses by which all of the citizens of the county are benefited, whether they live in an incorporated town constituting a part of the county or outside of such town.

The question decided in *Day v. Roberts, supra*, arose under these circumstances: The General Assembly undertook to amend the charter of the town of Smithfield, providing that property therein should not only be exempt from poor rates, road tax and school tax, but also from the county expenses for any year, provided the town should, at its own expense, provide for its poor and maintain its own streets. The board of supervisors did not undertake to levy any poor rates or any road tax upon the property located in the town of Smithfield, but did undertake to subject that property to the county levy for general county purposes, and also levied a school tax. No question was raised in that case, either in this court or in the court below, as to the validity of the charter so far as it undertook to exempt the taxpayers of Smithfield from poor rates and road tax. This court decided that the legislature had no power to exempt property in a town within the limits of a county and forming a part thereof from county school taxes or county levies, as distinguished from district levies. This language is used by Judge Buchanan in delivering the opinion of the court: "Constitutional provisions similar to the one now under consideration have frequently been before the courts. The settled construction placed upon them is that uniform taxation requires uniformity not only in the rate of taxation, and in the mode of assessment upon the taxable valuation, but that uniformity must be coextensive with the territory to which it applies. If a tax is imposed by the State,

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it must be uniform over the whole State; it by a county, city or town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable. *Knowlton v. Board of Supervisors*, 9 Wis. 410, 420-1; *Bright v. McCullough*, 27 Ind. 223 230; *Exchange Bank, &c. v. Hines*, 3 Ohio St. 15; *Sleight v. People*, 74 Ill. 47; *Dyar v. Farmington*, 70 Me. 515; *Hutchinson v. Osark Co.*, 57 Ark. 554, 22 S. W. 173, 38 Am. St. Rep. 258; *Pine Grove, &c. v. Talcott*, 19 Wall. 676, 22 L. Ed. 227; Cooley on Tax (2nd ed.) 244, 141; Cooley's Const. Lim. (6th ed.), 610; I Desty on Tax., sec. 35, p. 173; Burroughs on Taxation, 61 and 62."

In Cooley on Taxation (3rd ed.) p. 234, the general rule is thus stated: "When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provision."

The "territorial limits of the authority levying the tax," within which the taxes, under section 168 of our Constitution, must be uniform, corresponds with the taxing district lawfully prescribed for the peculiar benefit of which such taxes are levied and collected. Thus, while the board of supervisors has authority to impose county levies for county purposes upon all property located in the county, still under the Constitution itself (section 111) the territorial limits of its authority to levy uniform district taxes is confined to the limits of the particular magisterial district for the benefit of which the taxes are imposed, and they may and do levy varying rates in different districts in the same county.

Previous to the case of *Day v. Roberts*, *supra*; it had been decided in *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618, that section 8 of article 8 of the Constitution of 1869, conferred upon each county the right to levy a tax upon prop-

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erty for the benefit of the public free schools, which the General Assembly had no power to take away; and *Day v. Roberts*, as to the county school tax, is simply in accord with that previous decision.

Campbell v. Bryant, 104 Va. 516, 52 S. E. 638, arose after the adoption of the Constitution of 1902. The charter of the town of Madison Heights in that case was held to be invalid because of various constitutional inhibitions against special legislation. It attempted to exempt persons residing in the proposed town of Madison Heights from the payment of certain taxes to the county of Amherst, in violation of section 168 of the Constitution, and this court followed *Day v. Roberts* in declaring that the legislature had no right to exempt property located in the town from the general county levies, using the words "county levies" in contradistinction to district levies.

In *Moss v. County of Tazewell*, 112 Va. 878, 72 S. E. 945, this court, construing section 168 of the Constitution of 1902, sustained an act of the General Assembly providing for the issuance of county bonds for permanent road improvement, and authorizing the county to levy a special tax upon all property liable for State taxes lying in the magisterial district within which the proceeds of the bonds had been or were to be expended, to pay interest and create a sinking fund to redeem the principal at maturity. That act creates such district a separate taxing district for that specific purpose.

These cases are all consistent with each other, as well as in accord with the decisions in other jurisdictions.

The board of supervisors of Prince Edward county are prohibited by the very act under which they claim authority from levying any county road tax upon property located within the corporate limits of the town of Farmville, which maintains its own streets, while they are expressly authorized by the same act to impose the county levy upon such

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property. The fair construction of this section is that the legislature has created separate taxing districts in the county of Prince Edward for the purpose of levying road or street taxes. The town of Farmville is a separate taxing district for this purpose; and so much of the territory of the county of Prince Edward as lies without the limits of the town is another taxing district. The authority of the legislature to create special taxing districts for taxing purposes is supreme, unless expressly prohibited by the Constitution. The general underlying principle, then, is, that those who receive the benefits of the taxation may be required to pay such taxes. Taxes levied for general county purposes must be paid by all of the citizens of the county, and the board of supervisors may not discriminate between the citizens of the different sections of the county, while certain taxes required by law to be expended in certain defined localities of the county can be levied only upon the property located in those localities. Hence, in each county of the State there are magisterial districts in which the property is subject to certain district taxation, which must be uniform within such district, but the rates of taxation vary in the different districts. Code, sec. 944-a (12). So there are certain outlying sections of territory recently added to cities or towns in which certain rates of taxation prevail temporarily, different from the rates of taxation imposed upon other property which was already located within the municipality, previous to such territorial extension.

This record shows that the board of supervisors recognized the validity of that statute which it now attacks as violative of the uniformity clause of the Constitution (section 168), by levying a district road tax of 20 cents on the \$100 of taxable value upon property in Farmville magisterial district outside of the town of Farmville, upon the ground that such property in the town of Farmville was exempt from such district road levy. For the very same

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reason that the property in Farmville is exempt from the district road levy on property in Farmville magisterial district outside of the town, it is also exempt from county road taxes, namely, because it is required by law to maintain its own streets and has for that purpose been by the legislature created a taxing district separate from the county of Prince Edward. While the legislature cannot separate the town of Farmville from the county of Prince Edward for the purpose of exempting it from the county levy, there is nothing in the Constitution to prevent such separation for the purpose of creating it a separate taxing district for maintaining its own streets.

This cause has been rightly decided, and the decree will be affirmed.

Affirmed.

Syllabus.

Hytheville.**WHITE V. WHITE.**

June 14, 1917.

Absent, Burks, J.

1. **DIVORCE—Adultery—Demurrer.**—In the instant case, in a suit for divorce on the ground of adultery, the allegations of the bill in regard to the charge of adultery were held to sufficiently comply with the rule that the time, place and circumstances should be averred with reasonable certainty.
2. **DIVORCE—Competency of Witnesses—Deposition of Complainant.**—In a suit for divorce on the grounds of cruelty and adultery, the reading of the deposition of the complainant was assigned as error. It was conceded that the witness would have been competent if the suit had been based solely on the charge of cruelty, but it was contended that as he was not competent to testify upon the charge of adultery, he was incompetent for all purposes. The deposition, with the exception of a statement by witness that he had not condoned his wife's infidelity, dealt entirely with the charge of cruelty, and the decree complained of was based solely on the charge of adultery.

Held: That as the statement, which tended to negative condonation, might be disregarded without affecting the correctness of the decree, the question of the competency of the witness was immaterial.

3. **DIVORCE—Condonation—Pleading—Burden of Proof.**—Condonation is a matter of specific affirmative defense which must be specially pleaded, and the burden of proof is upon the defendant. The court may upon its own motion deny a divorce, even in the absence of any pleading setting up the defense, if it appears from the record that the injured party has condoned the acts complained of; but this eminently proper rule cannot be successfully invoked in the instant case, where the defense was neither pleaded nor proved, the evidence not disclosing the fact of condonation so as to warrant the court to act upon its own motion.
4. **DIVORCE—Condonation—Innocence.**—Innocence and condonation are thoroughly inconsistent defenses, and while it has been held that they may both be interposed in the same suit, the purpose of making both must not be left to doubtful inference.

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5. **APPEAL AND ERROR—Exceptions and Objections—New Trial—Evidence Insufficient to Support Verdict—Testimony of Children.**—In an action for divorce for adultery, the establishment of the charge of adultery depended on the testimony of two small boys, children of the parties, aged, respectively, nine and twelve years. The Supreme Court of Appeals refused to sustain an assignment of error that the court below erred in holding that the evidence was sufficient to sustain the charge of adultery. While expressing regret that children of any age, and especially those of such tender years, should be involved as witnesses in cases of this character, the court was constrained, as was the court below, upon a careful consideration of the record, to the conclusion that the testimony of these two boys was substantially true.
6. **APPEAL AND ERROR—Exceptions and Objections.**—Where, in an action for divorce for adultery, a note introduced in evidence alleged to have been written by the defendant, was the subject of considerable investigation and testimony in the lower court without any objection, it is too late to raise the point of admissibility upon appeal.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Isaac Diggs, for the appellant.

Stuart G. Christian, for the appellee.

KELLY, J., delivered the opinion of the court.

This is an appeal from a decree granting to Forest White an absolute divorce from his wife, Mildred Ann White.

The bill presented the complainant's case in a double aspect, first upon an allegation of cruelty, praying for a divorce *a mensa et thoro*, and, second, upon an allegation of adultery, praying for a divorce *a vinculo matrimonii*.

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There was a demurrer to the bill, which the court overruled. So far as this demurrer pertained to the charge of cruelty, it requires no consideration, as that branch of the case is not before us. The allegations charging adultery were sufficient, and the demurrer in this respect was properly overruled. The charge of adultery is as follows:

"Your complainant is further advised, and so charges, that on or about June 1st, and for some time previous thereto, his wife, Mily Ann Smith White, has been guilty of infidelity to him, and has committed adultery with a certain man to your complainant unknown, who frequently calls at your complainant's home while complainant is away following his vocation, and has relations with your complainant's wife which are inconsistent with any other presumption except that complainant's wife and the said unknown man have been guilty of acts of adultery.

"Complainant has been advised that his wife and a certain man who, as before stated, is unknown to complainant, retire to their bed room and remain together for long periods of time, and that complainant's wife commits other acts, all of which tend to strengthen and confirm the belief that she has been guilty of infidelity to complainant."

This was a sufficient compliance with the rule that the time, place and circumstances should be averred with reasonable certainty. The allegations conform to the rule approved in this State and elsewhere generally. *Miller v. Miller*, 92 Va. 196, 199, 23 S. E. 232; Bishop on Marriage and Divorce (8th ed.) sec. 606; 14 Cyc. 665; 9 R. C. L., p. 418, secs. 219-220.

The next error assigned is that the court erred in reading the deposition of the complainant, Forest White, whose testimony in his own behalf was taken and filed in the cause over the objection of the defendant.

It is conceded that this witness would have been competent if the suit had been based solely on the charge of cruelty,

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but the contention here made is that he was not competent to testify upon the charge of adultery, and that, being incompetent for one purpose, he was incompetent for all purposes. The question is immaterial. The deposition in question, with one exception to be presently mentioned, dealt entirely with the charge of cruelty, and the decree complained of was based solely on the charge of adultery. The only particular in which the testimony of this witness related to the latter charge was his statement that he had not had anything to do with his wife since he learned of her infidelity. This statement, which tended to negative condonation, may be disregarded without affecting the correctness of the decree. Condonation is a matter of specific affirmative defense which must be specially pleaded, and the burden of proof is upon the defendant. 9 R. C. L. p. 346; 7 Enc. Pl. & Pr. 91; 14 Cyc. 682; Ann. Cas. 1912-C, note pp. 22, 26. The court may upon its own motion deny a divorce, even in the absence of any pleading setting up the defense, if it appears from the record that the injured party has condoned the acts complained of; but this eminently proper rule cannot be successfully invoked in the present case, where the defense is neither pleaded nor proved. It is true that the defendant in her answer says, "her said husband has resided at his home, 914 St. John street, and she and her said husband have lived and cohabited together as man and wife until Monday, June 26, three days after he had instituted his suit against her;" but, taking her answer as a whole, and in the face of her indignant and emphatic denial of the charge, she cannot, after her adultery has been proved, convert her plea of innocence into a plea of condonation. Innocence and condonation are thoroughly inconsistent defenses, and while it has been held that they may both be interposed in the same suit, the purpose of making both must not be left to doubtful inference. Nor can we hold that the evidence discloses the fact of condonation so as to enable us, upon our

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own motion, to deny the relief sought by the complainant. The testimony chiefly relied upon for this purpose is the statement of the defendant (who testified in her behalf without objection) and of her fourteen year old daughter, that shortly before this suit was instituted (not afterwards, as contended) the complainant was at the home at which he and the defendant had resided, and a statement made by their twelve year old son, who appears to have given the complainant the first definite information as to the infidelity of his wife. This latter statement was to the effect that the complainant remained at home "a right smart while" afterwards, giving as a reason that "he was trying to catch the man." Upon this very meagre evidence the defendant asks us to hold that a condonation affirmatively appears, the argument being that cohabitation after knowledge of the offense constitutes condonation. The general rule undoubtedly is that where a husband, after he learns of adultery on the part of his wife, continues to reside with her, occupying the same room and bed, he will be presumed to be continuing his marital cohabitation; and such cohabitation, as against a husband, conclusively establishes the defense of condonation. But the evidence in this case fails to satisfy us that the plaintiff ever resumed marital cohabitation with his wife after he knew of her guilt. Disregarding his testimony altogether, it is apparent that the relations of these parties during the period now in question, whether he was, in fact, staying at the house with her or not, were of a hostile and disagreeable character, and the distinct impression to be derived from the record is that there was no such conduct on his part as amounted to a condonation. The defendant having neither pleaded nor proved the defense here under consideration, and there being nothing in the record upon which we can sustain it, this assignment of error must be overruled.

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The third and last assignment is that the court erred in holding that the evidence was sufficient to sustain the charge of adultery. The establishment of this charge depends upon the testimony of two small boys, children of the parties, aged, respectively, nine and twelve years. It is always regrettable and unfortunate that children of any age, and especially those of such tender years, should be involved as witnesses in cases of this character. For many and obvious reasons, they ought not to be introduced unless necessary to prevent a denial of justice, and in all such cases their testimony must be cautiously regarded because liable to be exaggerated or inaccurate. With due regard to these considerations, however, we are constrained, as was the court below, upon a careful consideration of the record, to the conclusion that the testimony of these two boys was substantially true.

Some criticism of the opinion of the lower court is made in the brief of counsel for appellant, on the ground that a certain note introduced in evidence, and the writing of which the defendant denied, was given considerable weight by the trial court, when, as a matter of fact, nothing appears in the record to show that the note in question had any bearing upon this case, even conceding that the defendant wrote it. The point is made too late. The card was the subject of considerable investigation and testimony in the lower court without any objection. It was evidently treated by the court and by counsel on both sides as being a proper subject of inquiry, and an examination of the original along with the copy which the defendant made at the trial, satisfies us, as it did the lower court, that the defendant wrote the original and falsely denied its authorship.

The evidence given by the two boys goes into details of a shocking and repulsive character, which neither require nor permit any further discussion.

We find no error in the decree complained of and it must be affirmed.

Affirmed.

Mythenville.

WOOD AND OTHERS v. WEAVER.

June 14, 1917.

Absent, Whittle, P. and Burks, J.*

1. **TREES AND TIMBER—Trespass—Election of Remedies.**—Every trespass consisting in the cutting of standing trees is in its nature an injury to real estate and the owner, besides his remedies in equity in proper cases, has the election to so treat the trespass and bring his action for damages to the market value of the land (where he is the owner of the land) or to the market value of the standing trees, if he owns only the latter. In such case the common law action of trespass *quare clausum fregit*, or (under statute, section 2901, Code of 1904) the same action on the case, is an appropriate remedy at law. The damages to the real estate may, however, be waived by the owner by his election to bring an action at law for the trees themselves, severed from the land, or for their value, as having been converted into some form of personal property. In this State, in the former case, detinue is the proper remedy, and, in the latter case, trover (the gist of which is the conversion), or a like action of trespass on the case for the conversion of the trees.
2. **TREES AND TIMBER—Trespass—Damages.**—In an action for damages for cutting and converting trees in all cases where the trespass is not willful, the damages are compensatory and the stumpage value of the trees, *i. e.*, the value of the trees as they stood immediately before they were severed from the land, is the measure of compensatory damages in such an action. The owner of the chattel is not allowed in such case to recover the added value due to the labor of the non-willful trespasser, because of the recognition, even in courts of law, of an equitable and quasi-property right acquired by one who adds value to property by his labor, although the property upon which it is expended may be the property of another, the labor being bestowed in a *bona fide* belief of a right to bestow it.

*Case submitted before Judge Burks took his seat.

Syllabus.

3. TREES AND TIMBER—*Trespass—Trover—Evidence—Damages—*

Where the trespass is not willful, the defendant may, even at law, in an action against him by the owner of the chattel for the conversion of it, adduce proof of value added to the chattel by his labor in mitigation of damages. But where the defendant is a willful trespasser the case is otherwise, and the plaintiff in his recovery of damages obtains the benefit of the value to the chattel by the labor of the wrong doer, not upon the principle upon which punitive or exemplary damages are imposed, but as the necessary result of the defendant's having deprived himself, by his wrong doing, of the right to interpose the defense under consideration in mitigation of damages.

4. TRESPASS—*Willful Trespass—Burden of Proof.*—Every trespass is *prima facie* willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appear from the evidence for the plaintiff, to show that the trespass was not willful.5. TRESPASS—*"Willful Trespass."*—"Willful," in its connection with trespass, is not confined in its meaning to the act of trespass itself, in the sense that such act itself is intentionally or knowingly done. In that sense every trespass would be willful. The legal meaning of the word "willful" in this connection is a technical one, which the courts and text writers have found it impossible to define in set terms which will fit every case. To be willful the act of trespass itself must be intentional, to be sure, for if done accidentally or by inadvertence or by mistake not induced by gross negligence, it will not be willful. A criminal intent is not essential, nor even a fraudulent intent. The act need not rise above the degree of gross negligence of the property rights of others to constitute the trespass a willful trespass. The act which constitutes a willful trespass may be anywhere in the domain of the law which extends from the region of felonies down to gross negligence, but is never found below the border line of the latter, in the region of mere negligence.6. TRESPASS—*"Willful Trespass"—Cutting Trees Under Claim of Right.*—A trespass committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, is not willful, and where, in the instant case, defendant cut the standing trees of plaintiffs under a *bona fide* claim of right, an instruction that the plaintiffs were not confined to compensatory damages, but were entitled to recover also the value added to the trees by the labor of defendant in manufacturing them into lumber, was error.

Statement.

Error to a judgment of the Circuit Court of Lunenburg county, in an action of trespass on the case. To a judgment reducing the amount of the verdict found by the jury, plaintiff assigns error.

Affirmed.

STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is an action on the case, at law, by the plaintiffs in error (plaintiffs also in the court below) against the defendant in error (defendant also in the court below), hereinafter referred to as plaintiffs and defendants.

The action is for damages to the plaintiffs caused by the cutting and conversion to his own use by defendant of certain trees belonging and conveyed to the plaintiffs by a certain timber deed.

The first count of the declaration is on the case (under statute, section 2901 of the Code of Virginia) for trespass *quare clausum fregit* to the real estate on which the trees conveyed by said trustees' deed were located. The second count was in trover to recover the value of the trees. There were two remaining counts, both on the case, for conversion of the trees and to recover their value. The trial in the court below was not had on the first, but on the other counts of the declaration.

The defendant's only plea was the general issue. There was a trial by jury, and a verdict for the plaintiffs. The jury thereby found the fact to be that the said cutting was done by the defendant or by his employees under his authority, express or implied.

To sustain this finding of the jury there was testimony for the plaintiffs consisting of circumstantial evidence of stump measurements of trees cut, the proximity of defendant's saw mill, it being on the same tract of land from which the trees were cut; the direct testimony that the

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employee of defendant having charge of the logging of such mill was seen on the land in question hauling logs therefrom; the statement of such employee on cross-examination tending to confirm this, although on re-examination he denied it; and the character of the defendant's own statement in his testimony on this subject to the effect that he had notified all his employees "to cease forthwith from cutting any timber on the premises in question; that while he did not know positively whether any timber was cut thereon after the 30th day of December, 1914" (the alleged cutting being after that date), "he knew that he notified all of his employees not to do any further cutting on said premises, and that if they did so they did so without authority from him," leaving room for the inference that he testified merely that he did not expressly authorize the cutting before it was done, but otherwise authorized it, as evidenced by his action in permitting the cutting to continue by his employees after the date mentioned without stating that it was done without his knowledge, or giving any facts showing that, with a reasonable supervision of his employees, to the end of seeing that his alleged instructions were obeyed he would not have known, or he could not have been reasonably expected to have known of the cutting complained of.

In this conflict and status of the evidence, under the rule applicable to the consideration thereof by this court, we must regard the fact to be that the trees were cut by the defendant, that is to say, by his employees under his authority, express or implied.

ON THE AMOUNT OF THE DAMAGES.

With respect to the measure of damages the trial court, on motion of the plaintiffs, without objection by the defendant, gave the jury the following instructions:

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"The court instructs the jury that if under the foregoing evidence they shall find for the plaintiffs, then in assessing the damages they shall inquire whether or not the defendant cut and removed the timber from the land in question with or without notice that the plaintiffs were claiming title thereto.

"If the jury shall find that the timber was cut with actual notice that the plaintiffs were claiming title thereto, and upon the defendant's own construction of his rights, then the jury shall assess the damages at the market value of the manufactured timber; but if the timber was cut without notice of the claims of the plaintiffs, the jury shall assess the damages to the plaintiffs on the basis of the stumpage value."

There was only one other instruction given. That was given on motion of the defendant, without objection by the plaintiffs, to the effect that the plaintiffs must prove their case by a preponderance of evidence as to every essential fact, including the alleged cutting of trees after the date above mentioned.

The facts as to the trees being cut by the defendant "with actual notice that the plaintiffs were claiming title thereto and upon the defendant's own construction of his rights," are as follows:

At the time of the cutting of the trees by defendant proved in the instant case, there was pending in the same court below in which the instant action was afterwards instituted, an action by the same plaintiffs against the same defendant as in the instant case, for damages for wrongful cutting and removal of timber from the same tract of land as that on which the trees were cut which are involved in the instant case. That said first action resulted in a judgment in April, 1915, in favor of the said plaintiffs against said defendant. That pending such first action, in order to prevent the said defendant from cutting and removing

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any trees from said premises under his claim of title thereto, until the case could come to trial, in a suit in equity instituted by said plaintiffs for the purpose, an injunction was duly awarded and served on said defendant in December, 1914, prohibiting him from cutting and removing any such trees.

The trees in the instant case were cut by the defendant after the service of this injunction upon him and in violation of such injunction.

It is true the defendant denied in his testimony that he cut the said trees and testified that "he immediately upon being served with said injunction notified all his employees to cease forthwith from cutting any timber on the premises in question," etc., as above quoted from his testimony. But the verdict of the jury is conclusive upon us, as above stated, of the fact being that the defendant did do the cutting in question in violation of the injunction. Nevertheless, in view of the instructions given, quoted above, the jury may have found (and as we shall presently see, manifestly did find) the fact to be that the defendant did such cutting "upon the defendant's own construction of his rights," that is to say, under a claim of title on his part to the trees cut by him. It is further true that the evidence on the question of whether such claim of title was *bona fide* is not as explicit as it might be, nor as would be required by the rule that the burden of proof as to this matter is on a trespasser, but for the instruction given as aforesaid.

Although the defendant testified as a witness in the case, as aforesaid, he does not say that he cut the trees under his claim of title or show that such claim was *bona fide* and not induced by gross negligence on his part. But there was other evidence aforesaid from which the jury might have found the fact to be that he did the cutting under such claim of title and that the latter was *bona fide*; the trial court by the instruction given asked for by the plaintiff,

Statement.

submitted this question to the consideration of the jury in such a way as would make the rule as to burden of proof, above adverted to, operate an injustice upon the defendant if pressed further than it was by the trial court in the instant case, or if pressed further therein by us.

The market value of the trees manufactured into lumber was \$720.00. Their stumpage value, that is to say, their value as standing timber immediately before they were severed from the land, was \$276.00.

The verdict of the jury was for \$720.00. In view of said quoted instruction, this did not mean a finding by the jury that the trespass of the defendant in the cutting of the trees was a willful trespass, but the contrary, since the trial court instructed them, in effect, to find that very verdict if they believed from the evidence that the trespass was not willful, but under *bona fide* claim of title.

We must therefore regard the fact to be that the trespass of the defendant in question was not willful, but was committed under a *bona fide* claim of title.

It is true the trespass in question was committed also in violation of an injunction. But the violation of the injunction was not relied upon by plaintiffs in the court below as evidencing a willful trespass. Indeed by the instruction, asked for by the plaintiffs and given by the trial court, any distinction of the instant case on the question of the willfulness of the trespass, because of the violation of an injunction, was ignored. The trial in the court below, on the plaintiff's own choosing, proceeded in disregard of such violation having any bearing on the measure of damages. Hence we are relieved of considering in the instant case whether such feature of the case would or would not have any bearing on the question of whether the trespass was willful or the contrary; and we must regard

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the instant case as if it were that of a trespass committed under a *bona fide* claim of title free from any complication of the violation of an injunction.

On the rendition of said verdict the defendant moved the court below to set it aside and grant him a new trial on the following grounds:

First. Because the verdict was for an excessive amount.

Second. Because the verdict was contrary to the law and the evidence.

Thereupon the trial court put the plaintiffs upon terms to accept \$276.00, the stumpage value of the said trees cut, or the verdict would be set aside and a new trial granted, which judgment the plaintiff accepted under protest, the judgment of the court was entered accordingly for such reduced amount, and that action of such court is assigned by the defendant before us as error.

Geo. E. Allen and P. P. Homes, for the plaintiffs in error.

N. S. Turnbull, Jr., for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The assignment of error in this case involves only one question, but that is the very important question, of—

What is the proper measure of damages in a case of wrongful cutting of timber?

This question, although adverted to in the case of *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 76 S. E. 330, was not therein involved or decided, and seems of first impression in this State. It is well settled, however, in England, in the federal courts of the United States and in many of our State courts.

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1. Every trespass consisting in the cutting of standing trees is in its nature an injury to real estate and the owner besides his remedies in equity in proper cases, has the election to so treat the trespass and bring his action for damages to the market value of the land (where he is the owner of the land) or to the market value of the standing trees, if he owns only the latter. 3 Sedg. on Dam. (9th ed.) sections 931-2-3. In such case the common law action of trespass *quare clausum fregit*, or (under statute, section 2901, Code of Virginia) the same action on the case, is an appropriate remedy at law.

The damages to the real estate may, however, be waived by the owner by his election to bring an action at law for the trees themselves, severed from the land, or for their value, as having been converted into some form of personal property. In this State, in the former case, detinue is the proper remedy and, in the latter case, trover (the gist of which is the conversion), or a like action of trespass on the case for the conversion of the trees.

2. In both of the actions last named (which the several counts in the declaration on which the instant case was tried covered) the measure of compensatory damages, as it was at one time thought and held (and is yet in some of the jurisdictions, because of the supposed nature of the action) was the value of the trees after they were severed, including the value added thereto by the labor expended in their severance from the land (2 Sedg. on Dam., sections 500, 501, 502; 3 *Idem.*, section 934; 15 Am. & Eng. Anno. Cas. 916 to 924); but it is now generally held that the stumpage value of the trees, *i. e.*, the value of the trees as they stood immediately before they were severed from the land, is the measure of compensatory damages in such an action.

3. Such measure of damages—compensatory damages only—is applied in all cases where the trespass is not willful, notwithstanding that it may be that there has been

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value added to the chattel—the material in the trees in the instant case—by the labor of the trespasser expended thereon such as the manufacture of the trees into lumber. The owner of the chattel is not allowed in such case to recover the added value due to the labor of the non-willful trespasser, because of the recognition, even in courts of law, of an equitable and quasi-property right acquired by one who adds value to property by his labor, although the property upon which it is expended may be the property of another, the labor being bestowed in a *bona fide* belief of a right to bestow it. (2 Sedg. on Dam., sections 499, 500, 501, 502, 503; 3 *Idem.*, section 934.) The same principle underlay the common law doctrine of recoupment (Waterman Set-Off, Recoupment and Counter Claim, sections 417, 421, 422, 428, 486.) This principle was firmly established in the civil law also. (Inst. of Justinian, lib. 11, title 1, section 34.) As translated by Dr. Cooper, it is said in the civil law, “to be absurd that the work of an Apelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter has possession fairly, but if he, or any other, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft.”

The defendant, therefore, in such cases of value added to the chattel by his labor, may, even at law, in an action against him by the owner of the chattel for the conversion of it, adduce proof of such added value in mitigation of damages.

4. Not so, however, of a defendant in such case, who is a willful trespasser. His *mala fides* deprives him of the benefit of such defense. The law will not give ear to it.

In the latter case the plaintiff in his recovery of damages obtains indeed the benefit of the value to the chattel by the labor of the wrong-doer, but not, however, upon the principle upon which punitive or exemplary damages

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are imposed (as is pointed out in the case of *Trustees of Dartmouth College v. International Paper Co.* [C. C.], 132 Fed. 92), but as the necessary result of the defendant's having deprived himself, by his wrong doing, of the right to interpose the defense under consideration in mitigation of damages. (See *Bailey v. Haynes*, 65 Wash. 57, 117 Pac. 720.)

5. In the instant case it is urged that the burden of proof was on the defendant to show that the trespass was not willful. This is a correct statement of the law—a trespass by the defendant having been proved by the evidence.

Every trespass is *prima facie* willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appear from the evidence for the plaintiff, to show that the trespass was not willful. (*United States v. Home Stake Min. Co.*, 117 Fed. 481, 54 C. C. A. 303; *Trustees of Dartmouth College v. International Paper Co.*, *supra*; *United States v. Ute, &c., Co.*, 158 Fed. 20; 85 C. C. A. 302; *Mississippi, &c., Co. v. Page*, 68 Minn. 269, 71 N. W. 4; *Young v. Pine Ridge Lumber Co.* (Tex. Civ. App.), 100 S. W. 784; *Milltown Lumber Co. v. Carter*, 5 Ga. App. 344, 63 S. E. 270; *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681.

In the instant case the facts, noted above in the statement of facts bearing on the question of whether the trespass was willful or the contrary, appeared from the evidence for plaintiffs.

6. On the question as to when a trespass is willful, the decisions are almost innumerable. They develop, however, certain well settled conclusions. Willful, in this connection, is not confined in its meaning to the act of trespass itself, in the sense that such act itself is intentionally or knowingly done. In that sense every trespass would be willful. The legal meaning of the word willful in this connection is a technical one, which the courts and text writers have

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found it impossible to define in set terms which will fit every case. To be willful the act of trespass itself must be intentional, to be sure, for if done accidentally or by inadvertence or by mistake not induced by gross negligence, it will not be willful. (*Livingston v. Rawyards Coal Co.*, L. R. 5 App. Cas. 33; *Bolles Wooden ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737; *U. S. v. McKee* (D. C.), 128 Fed. 1002; *Sligo Furnace Co. v. Hobart-Lee Tie Co.*, 153 Mo. App. 442, 134 S. W. 585; *Holt, &c., v. Hayes*, 110 Tenn. 42, 73 S. W. 111.) On the other hand the act may be felonious, or fall short of that and be a theft, or short of that and be a fraud, and yet short of that and be "in bad faith" or "not in good faith," and still short of that and be grossly negligent of the property rights of others, with respect to exercising proper diligence to ascertain the true identity, location or title to property—as when the act is wanton, or reckless—and in all these degrees of disregard of the rights of others the act will be willful. But a criminal intent is not essential, nor even a fraudulent intent. The act need not rise above the degree of gross negligence of the property rights of others to constitute the trespass a willful trespass. *Trustees of Dartmouth College v. International Paper Co.*, *supra*, so holds in effect; *Farris v. Am. Tel. & Tel. Co.*, 84 S. C. 102, 65 S. E. 1017; *Durant Min. Co. v. Percy, etc., Co.*, 93 Fed. 166, 35 C. C. A. 252; *American Sand & Gravel Co. v. Spencer*, 55 Ind. App. 523, 103 N. E. 426. Mere negligence of the trespasser with respect to ascertaining the true location of property, or the title to it, will not render the trespass willful (*Powers v. U. S.*, 119 Fed. 562, 56 C. C. A. 128; *U. S. v. Eccles* (C. C.), 111 Fed. 490; *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; *Durant Min. Co. v. Percy, etc., Co.*, *supra*). There is some conflict in the authorities however. See *Donoven v. Consol. Coal Co.*, 187 Ill. 28, 58 N. E. 290, 79

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Am. St. Rep. 206; *Mississippi, etc., Co. v. Page*, *supra*, and the Texas case of *Young v. Pine Ridge Lumber Co.* (Tex. Civ. App.), 100 S. W. 784, and other Texas cases. This last named case goes beyond the true rule, to the extreme of holding that if the trespasser, by the exercise of reasonable care and diligence, would have known that he had no title to the timber cut he was a willful trespasser; which, in effect, holds that if he was guilty of negligence the trespass was willful. To the same effect *Messer v. Walton*, 42 Tex. Civ. App. 488, 92 S. W. 1037; *Ripy v. Less*, 55 Tex. Civ. App. 492, 118 S. W. 1084. The great weight of authority, however, is as above stated.

In short, the act which constitutes a willful trespass may be anywhere in the domain of the law which extends from the region of felonies down to gross negligence, but is never found below the border line of the latter in the region of mere negligence.

To be more specific. The trespass must be committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, otherwise it is willful; and, conversely, if it be in truth committed under such claim of right or title, not induced as aforesaid, it is not willful. *Bolles Woodenware Co. v. U. S.*, *supra*; *Nesbitt Lumber Co.*, 21 Minn. 491; *U. S. v. Homestake Min. Co.*, *supra*; *State of Minn. v. Shevlin-Carpenter Co.*, 62 Minn. 99, 64 N. W. 81; *Bond v. Griffin*, 74 Miss. 599, 22 So. 187; *Ill., &c., R. Co. v. La Blanc*, 74 Miss. 626, 21 So. 748, where the trespass was committed pending suit involving the title; *Clark v. Holdridge*, 12 App. Div. 613, 43 N. Y. Supp. 115; *Lewis v. Va.-Carolina, etc., Co.*, 69 S. C. 364, 48 S. E. 280, 140 Am. St. Rep. 806; *Chappelle v. Puget Sound Reduction Co.*, 27 Wash. 63, 67 Pac. 391, 91 Am. St. Rep. 820; *U. S. v. Northern, etc. R. Co.* (C. C.), 67 Fed. 890; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *Gentry v. U. S.*, 101 Fed. 51, 41 C. C. A.

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185; *U. S. v. Van Winkle*, 113 Fed. 903, 51 C. C. A. 533; *U. S. v. Eccles*, *supra*; *Powers v. U. S.*, 119 Fed. 562, 56 C. C. A. 128; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737; *Fisher v. Brown*, 70 Fed. 570, 17 C. C. A. 225; *Dewitt v. Saner-Whiteman Lumber Co.* (Tex. Civ. App.), 155 S. W. 980; *Cullen v. Collins*, 56 Tex. Civ. App. 620, 120 S. W. 546; *Guarantee Trust & Safe Dep. Co. v. Drew*, 107 La. 251, 31 So. 736; *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49. This rule is not changed by the fact that the trespasser has notice at the time of the trespass that another asserts a *bona fide* title to the same property. *Ill., etc., R. Co. v. LaBlanc*, *supra*, and many of the other authorities above cited.

This may affect the degree of care and diligence, with respect to ascertaining who holds the true right or title, the trespasser must exercise in order not to subject himself to the imputation of being a willful trespasser, because of his gross negligence in the premises, but it does not change such rule.

As noted in the statement of facts above, the instant case is one of a non-willful trespass committed in the cutting of standing trees. Therefore, under the well settled rule shown by the above cited authorities, the plaintiffs were entitled to recover only compensatory damages, un-augmented by the added value due to the labor of the defendant in manufacturing the trees into lumber—that is to say, in such case, the stumpage value of the trees, or \$276.00 was the correct measure of the plaintiff's damages.

7. As we have seen, in the "Statement of the case and facts," above, on submitting the case to the jury, the instruction, given at the instance of the plaintiff, on the subject of the measure of damages, was erroneous, in that it instructed the jury, in effect, that if the defendant cut the standing trees under a *bona fide* claim of title, the

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plaintiffs were not confined to compensatory damages, but were entitled to recover also the value added to the trees by the labor of defendant in manufacturing them into lumber. The trial court, therefore, on the motion of the defendant to set aside the verdict as excessive and as contrary to the law and the evidence, properly corrected the error it had committed at the instance of plaintiff, in so erroneously instructing the jury as manifestly to cause them to find the excessive verdict, by reducing the amount of the latter to the amount which the jury should have found as damages upon a correct instruction on the measure of damages. This action of the court was just and right.

Therefore, for the reasons given above we find no error in the judgment complained of and it will be affirmed.

Affirmed.

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Hytchville.

YATES v. LEY.

June 14, 1917.

Absent, Burks, J.

1. **ACKNOWLEDGMENT—*Deed of Trust—Acknowledgment Taken by Trustee who was Notary Public.***—A certificate of acknowledgment to a deed of trust is void, where the acknowledgment was taken and certified by a notary, who was designated in the deed as trustee.
2. **NOTARY PUBLIC—*Liability.***—A notary public is not liable for a loss resulting from the fact that, within his jurisdiction and in good faith, he took and certified a void acknowledgment to a deed.
3. **PUBLIC OFFICERS—*Liability.***—Public officers who erroneously exercise judicial functions are not liable therefor in damages in any case in which they have acted within their jurisdiction and in good faith.
4. **AGENCY—*Notary Public.***—Plaintiff contended that defendant, the cashier of a bank and a notary public, was her agent in negotiating and placing a loan, and was liable for a loss occasioned by his taking the acknowledgment to a deed of trust in which he was named as trustee. Defendant introduced evidence that the transaction in question was conducted by plaintiff's nephew, a law student; that he was not plaintiff's adviser and did nothing more in negotiating the loan than to tell her nephew that he thought the property was worth the debt; that he was named as trustee without his knowledge; and, that if he had known that he was trustee he would not have known that this fact affected the validity of the acknowledgment. There was other evidence supporting defendant's position, that, if he was the plaintiff's agent or bailee in any sense at all, he was so merely in a gratuitous capacity and at most could only be held liable for gross negligence.
Held: That there was ample evidence upon which to base a verdict for defendant.
5. **ACKNOWLEDGMENTS—*Liability of Notary.***—The taking of an acknowledgment to a deed by a notary public is, under the law of Virginia, a judicial act and a notary public is by the law of Virginia authorized to take acknowledgments to deeds

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of all persons appearing before him for that purpose, within the limits of the county or city for which he is appointed; and the question as to whether or not he can take a valid acknowledgment to a deed, in which he is named as trustee, is a question of law, and for an error on the part of a notary public in taking an acknowledgment as such and in good faith to any deed to which he is a party as trustee, he is not liable for damages to a party who suffers damage or loss thereby.

6. *AGENCY—Gratuitous Agent or Bailee—Liability for Negligence.*—An agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. This is the general rule; and it is the rule applicable to the instant case. There is nothing in the evidence to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject matter of the agency.
7. *APPEAL AND ERROR—Harmless Error—Instructions.*—In an action against a trustee in a deed of trust for a loss through the defective acknowledgment of the deed, the trial court was requested by plaintiff to instruct the jury that any negligence of plaintiff's agent, if the jury believe that he was in any way negligent, which concurred with or intervened after the negligence of defendant, should they believe him negligent under the instructions of the court, does not relieve the defendant of his liability to the plaintiff for her loss proximately caused by some negligent act of his. And even though they may believe from the evidence that the agent was negligent, and further believe from the evidence that his negligence contributed to the loss of the plaintiff, yet if the negligence of defendant was the efficient cause of the plaintiff's loss, defendant is liable. The court refused to give this instruction. Conceding that the instruction, technically and in the abstract, embodied a correct rule of law, its refusal should be regarded as harmless error, where the instructions as a whole presented the respective contentions of the parties in a full and fair manner, placing the emphasis where it belonged, and leaving no probable chance for the jury to find against the plaintiff, if they believed from the evidence that negligence of the defendant was the cause of her loss.

Error to a judgment of the Corporation Court of the city of Danville, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

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The opinion states the case.

A. M. Aiken and Malcolm K. Harris, for the plaintiff in error.

William Leigh and Eugene Withers, for the defendant in error.

KELLY, J., delivered the opinion of the court.

J. M. Ley was named as the trustee in a deed of trust to secure Augusta Yates in the payment of a loan made by her to W. S. Paylor. Ley was a notary public and as such took and certified the acknowledgment to the deed. Paylor proved to be insolvent. The certificate, under the settled law of this State, was void, and Miss Yates was deprived of the preference which otherwise she would have had over other creditors, and thereby lost a large part of her debt. She brought this action of trespass on the case against Ley, seeking to hold him responsible for the loss. There were three mistrials, each owing to a failure of the jury to agree. The fourth trial resulted in a verdict and judgment for the defendant, and the plaintiff brings the case here for review.

The declaration contains three counts, but there are only two theories advanced therein upon which a recovery is sought.

The first is that the defendant, who was the cashier of the bank in which the plaintiff's money was deposited at the time, was her agent and bailee in negotiating and placing the loan; that he was designated as trustee by his own consent and request, and upon the consideration that he would have the deed of trust properly executed, acknowledged and recorded before delivering the check for the loan; that he ought to have known and did know that the certificate of acknowledgment was void; that it was

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his duty as her agent and bailee to exercise ordinary and reasonable care to avoid any act or omission that would result in the loss of her money; that he violated this duty and thereby became liable to her. There was also an allegation of corrupt conduct on the part of the defendant which does not appear to have been relied upon, and may be disregarded.

Upon this first aspect of the case the defendant's position was, that if he was the plaintiff's agent or bailee in any sense at all (which he denies), he was so merely in a gratuitous capacity, and at most could only be held liable for gross negligence.

We shall not discuss at length the evidence upon this point, since the question was one for the jury and was by it resolved in favor of the defendant. On behalf of the plaintiff it is earnestly insisted that there was no real conflict of testimony, and, therefore, no question for the jury, the argument being that the defendant's own version of the transaction is inherently incredible. We are unable to take this view of the case. There can be no doubt, and it is not now denied, that the transaction in the main was conducted by the plaintiff's nephew, A. M. Aiken, Jr., a young man twenty-one years of age, then a law student, and now of counsel in this case. He prepared the deed of trust, and received the bonus paid by the borrower, which, so far as appears, was the only compensation paid to anybody in connection with the matter. He also had entire control of his aunt's money, deposited it in his individual name in Ley's bank, and signed the check by which the money was paid, through Ley, to Paylor. Miss Yates did not see Ley at any time in connection with the matter. Such communications as passed between them were carried on by verbal messages through Aiken. As to these facts, there is no serious dispute, and they are clearly established by the record. There is evidence on

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the part of the plaintiff, which, if undisputed, would perhaps prove that Aiken acted throughout under the advice and direction of the defendant, but this the latter emphatically denies. He testifies that he was not the plaintiff's adviser, except in a friendly way, and in response to requests and inquiries coming through her nephew; that he did nothing more in negotiating the loan than to tell her nephew, in reply to an inquiry, that he thought the Paylor property was worth the debt; that he was named as trustee without his knowledge; that if he had known he was trustee, he would not have known that this fact affected the validity of the acknowledgment; that in filling out the certificate he did not look to the body of the deed even to get the date because the certificate had already been typewritten by Aiken, leaving nothing for him to do except to insert his name, the date of the expiration of his commission as notary, the date of the acknowledgment, and to affix his signature; and that after he took and certified the acknowledgment he delivered the deed to Aiken and saw it no more until after the insolvency of Paylor developed. The certificate was as follows, the italics indicating the only words and figures inserted by Ley:

"State of Virginia,

"City of Danville, to-wit:

"I, *J. M. Ley*, a Notary Public, in and for the city of Danville, in the State of Virginia, do certify that W. E. Paylor and A. E. Paylor, his wife, whose names are signed to the foregoing and annexed deed, bearing date of the 14th day of September, 1911, have severally acknowledged the same before me in my city and State aforesaid. My commission as Notary Public expires on the *18th* day of *February*, 1915.

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"Given under my hand this 15th day of September, 1911.

"J. M. LEY,"

"Notary Public."

We are clearly of opinion that there was ample evidence upon which to base a verdict for the defendant on the issues of fact, and the only remaining question to be considered upon this branch of the case is whether the jury was properly instructed upon the law applicable thereto. It will be more orderly, however, to dispose of the questions arising upon the instructions after we shall have discussed somewhat the second theory upon which the plaintiff rests her claim to a recovery. This theory is that the defendant, in his official capacity as notary public, owed plaintiff the duty of exercising the functions of his office legally and within his jurisdiction, and that he caused her a loss of property by a breach of this duty.

There is, we think, under the authorities in this State, no room for question as to the correctness of the judgment upon this branch of the case. The notary undoubtedly acted within his jurisdiction, although he erred in its exercise. No bad faith on his part is shown or claimed. The inquiry, therefore, is reduced to this narrow issue: Is a notary public liable under the law in Virginia for a loss resulting from the fact that, within his jurisdiction and in good faith, he has taken and certified a void acknowledgment to a deed? The authorities have settled this question in the negative. The taking of an acknowledgment is a judicial act. *Davis v. Beazley*, 75 Va. 491, 496; *McCauley v. Grim*, 115 Va. 610, 612, 79 S. E. 1041, 2 Minor's Real Prop., sec. 1398. Public officers who erroneously exercise judicial functions are not liable therefor in damages in any case in which they have acted within their jurisdiction and in good faith. *Johnston v. Moor-*

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man, 80 Va. 131, 141-2; *Henderson v. Smith*, 26 W. Va. 829, 33 Am. Rep. 139, 145; 2 Cooley on Torts (3d ed.), 795.

Proceeding now to take up the instructions to the jury, it may be said that the foregoing discussion has practically disposed of the objections urged against them. The questions of fact as to the defendant's relationship to Miss Yates, whether a paid agent and bailee, or a stranger, and the rules of law controlling the liability in these respective relationships were submitted to the jury clearly and correctly, with the further instruction that, when a notary public takes an acknowledgment to a deed, within his jurisdiction and in good faith, he acts judicially and cannot be held liable in damages for an error made by him in the exercise of this function.

While there was an exception to the action of the court in refusing six of the eleven instructions asked for by plaintiff, and in giving six requested by the defendant, and a general assignment of error accordingly, the principal complaint made in the petition for the writ of error is directed at the giving of defendant's instructions 2 and 9 and the refusal of plaintiff's instruction "J."

Instruction 2 was as follows: "The court instructs the jury that the taking of an acknowledgment to a deed by a notary public is, under the law of Virginia, a judicial act and a notary public is by the law of Virginia authorized to take acknowledgments to deeds of all persons appearing before him for that purpose, within the limits of the county or city for which he is appointed; and the question as to whether or not he can take a valid acknowledgment to a deed, in which he is named as trustee, is a question of law, and for an error on the part of a notary public in taking acknowledgments as such and in good faith to any deed to which he is a party as trustee, he is not liable for damages to a party who suffers damage or loss thereby."

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As already indicated, the foregoing instruction is a correct statement of the law in Virginia, and no further comment is necessary.

Instruction 9 was as follows: "The court instructs the jury that if they believe from the evidence that the defendant, J. M. Ley, without pecuniary compensation, and solely for the accommodation of the plaintiff, undertook to and did procure the signatures of W. S. Paylor and wife, A. E. Paylor, to the deed of trust in evidence in this case, and did take the acknowledgment of said Paylor and wife thereto, and thereafter put said deed of trust, so signed and acknowledged, in the clerk's office of this court for recordation, and did then, in pursuance of directions from plaintiff previously given, deliver, or cause to be delivered to W. S. Paylor the check evidencing the loan secured by said deed of trust, and that said defendant, Ley, was without gross negligence on his part in so doing, then they must find for the defendant."

An instruction given by the court, upon its own motion, and not objected to by either party, embodies substantially the proposition of law contained in this one, namely, that an agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. This is the general rule (2 Min. Inst., p. 276; *Carrington v. Ficklin*, 32 Gratt. [73 Va.] 670, 677; 1 Am. & Eng. Enc. L., 2d ed., 1070; 2 C. J. 722); and it is the rule applicable to this case. There is nothing in the evidence, nor, as we understand, in the contention of the plaintiff, to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject matter of the agency.

Instruction "J.," refused by the court, was as follows: "The court instructs the jury that any negligence of A.

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M. Aiken, Jr., if the jury believe that he was in any way negligent, which concurred with or intervened after the negligence of J. M. Ley, should they believe him negligent under the instructions of the court, does not relieve the said J. M. Ley of his liability to the plaintiff for her loss proximately caused by some negligent act of his. And even though they may believe from the evidence that Aiken was negligent, and further believe from the evidence that his negligence contributed to the loss of the plaintiff's, yet if they further believe from the evidence that the negligence of J. M. Ley was the efficient cause of the plaintiff's loss, the said J. M. Ley is liable for the full amount of the loss, and they must so find for the plaintiff."

In pressing upon us the propriety of this instruction, the plaintiff in her petition for the writ of error says: "The principal defense of the defendant was upon the theory that even though Ley was admittedly negligent, that such negligence was excusable by reason of the fact that Aiken failed to subsequently discover and correct Ley's mistake." We are unable to discover that any such defense as this was made, much less that it was the principal defense. Upon the contrary, the issues were drawn and the case was tried upon the two theories hereinbefore set out, and the principal defense under the agency theory was that Ley was not the agent of Miss Yates at all, or at most was only a gratuitous agent. It is true that the defendant stressed the evidence of Aiken's agency, but this was done to negative the claim that the defendant was the representative of Miss Yates—not to excuse any negligence of his own in that capacity. Moreover, under the evidence in the case, this instruction might have led to confusion with instruction 2, without some further expression therein limiting it to the agency theory.

The case of *Henderson v. Smith*, *supra*, which was an action against a notary for defectively certifying an acknowledgment, seems to be authority for the proposition

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that in cases of this character the acceptance of the defective certificate and the subsequent recordation of the deed must be regarded as the proximate, and the notary's error as the remote, cause of the resulting loss. In that view, cases like *Walton, Witten and Graham v. Miller*, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908, involving the principle of the concurring negligence of two or more parties in the production of an indivisible loss, would have no application here. We do not, however, rest our conclusion with reference to instruction "J" upon this latter ground. If it be conceded that the instruction, technically and in the abstract, embodied a correct rule of law, we do not think its refusal in this case should be regarded as harmful error.

The instructions as a whole presented the respective contentions of the parties in a full and fair manner, placing the emphasis where it belonged, and leaving no probable chance for the jury to find against the plaintiff, if they believed from the evidence that negligence of the defendant was the cause of their loss. The learned and able judge who presided at all four of the trials declined to set aside the verdict, and we think his judgment was right. Due regard being had to the established rules of law and procedure which are guaranteed to litigants and constitute safeguards of property rights, a sound public policy requires that there should be a reasonably speedy end to every law suit. To reverse this case for the refusal of instruction "J" would be a backward step in the proper enforcement of this principle of public good, and would be inconsistent with the modern trend of legislative and judicial policy in applying the doctrine of harmless error. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752, 757.

The result operates a hardship on Miss Yates, which we deplore; but it does not seem improper to add that upon

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the record before us the verdict of the jury appears to comport with the weight of the evidence and must be regarded as the right of the case, unless and until it is held, as a general proposition of law, that a notary public, acting in his jurisdiction and in good faith, is liable for damages resulting from an error made by him in taking and certifying an acknowledgment to a deed.

The judgment is affirmed.

Affirmed.

Syllabus.

Staunton.

ASBERRY v. MITCHELL.

September 20, 1917.

1. **VENDOR AND PURCHASER—Specific Performance—Sufficiency of Description of Land.**—In a contract for the conveyance of land, the specific performance of which was sought by complainant, the land was described as 100 acres of land bounded by R. on the north and by M. on the south, off of the west end of the farm of the vendor. The location of the R. and M. tracts, and the western boundary of the vendor's land were well known to all the parties. As the language of the contract, giving the north and south boundary, and providing that the 100 acres be cut off of the west end of the farm of the vendor, necessarily imports that the east line must run due north and south, the land is sufficiently described in the contract to enable the court, with the aid of permissible extrinsic evidence, to locate it.
2. **BOUNDARIES—Deeds—Contracts of Sale—Parol Evidence.**—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury, or by the court, by the aid of extrinsic evidence.
3. **SPECIFIC PERFORMANCE—Infants.**—An infant can compel specific performance of a contract for the conveyance of land to him, made with an adult, based on the consideration that the infant should pay all expenses of the adult at a hospital and maintain him during his natural life, which covenants the infant had performed.
4. **SPECIFIC PERFORMANCE—Personal Services.**—Where the consideration of a contract for the conveyance of land involves personal services to be rendered by the grantee to the grantor, a court of equity will not decree specific performance, because it cannot look after the rendition of personal services. The rule, however, is otherwise where, by the performance of the services contracted for, the contract becomes mutual in obligation and remedy.

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5. **SPECIFIC PERFORMANCE—Infants.**—Want of mutuality is said to be the only reason assigned why a court of equity will not decree specific performance of a contract at the suit of an infant. And where at the time of the institution of the suit for specific performance, the infant has fully performed the contract on his part, there is no want of mutuality of obligation and remedy, and specific performance may be rightly decreed.
6. **INFANTS—Judgments and Decrees.**—Under statutes similar to section 3424, Code 1904, even in cases where infants were defendants, as a general rule, it has been held that they are as much bound by decrees as an adult, and can only impeach them for causes for which an adult could, such as fraud, collusion, error, or the like. With stronger reason must this be true when the decree is in favor of the infant and in a suit in which he is plaintiff.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

J. Powell Royall and Jackson & Henson, for the appellant.

Greever, Gillespie & Divine and C. R. Brown, Jr., for the appellee.

WHITTLE, P., delivered the opinion of the court.

E. R. Mitchell, an infant suing by his next friend, brought this suit against the administrator and heirs of H. C. Asberry, deceased, to enforce specific performance of a written contract whereby Asberry agreed, in consideration of natural love and affection, and for the further consideration that Mitchell would pay all his expenses at the Abingdon hospital, and maintain him during his natural life, to convey to Mitchell the one hundred acres of land described in the contract, together with all his personal property. From a decree granting the prayer of the bill this appeal was allowed.

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The mother of appellee was a daughter of Asberry, and died when the child was only sixteen days old, at which time the grandfather took him to his home where he has ever since resided. In May, 1915, Asberry, then seventy-nine years of age, developed bladder trouble, and was advised by his physician, Dr. Holmes, to go at once to the hospital at Abingdon, Virginia, for treatment. At that time Asberry informed Dr. Holmes that he "wanted to fix it so Elbert Mitchell, his grandson, would get 100 acres more land, and his personal property," and asked the doctor if he "could fix it for him." Dr. Holmes further testified that Asberry "did not itemize his personal property, but told me he wanted Elbert to have it all; and I asked him in regard to his money, and he said that too—money and notes." Witness stated that Mr. Asberry then gave him the boundaries of the land as they are set out in the contract; whereupon he tore a leaf out of his day book and wrote the contract and read it to Asberry, who said that was what he wanted. The contract was then signed by both parties and delivered to appellee, who requested Dr. Holmes to keep it for him, which he consented to do and it remained in his possession until Mr. Asberry's death, which occurred some ten months afterwards. Although, as might be expected in a controversy of this character, the evidence was conflicting, nevertheless it preponderated in appellee's favor and showed that he had in good faith fully performed the contract on his part.

In this state of the record, two controlling propositions of law are submitted for our determination:

1. Is the one hundred-acre tract of land sufficiently described in the contract to enable the court with the aid of permissible extrinsic evidence to locate it; and
2. Whether or not an infant can compel specific performance of a contract for the sale of land made with an adult, based on the consideration that he should pay all expenses

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of the latter at a hospital and maintain him during his natural life, which covenants the infant had performed?

These propositions will be considered in the order stated.

1. The land in controversy is described in the contract as "100 acres of land bounded by Sarah M. Ratliff on the north and by E. R. Mitchell on the south, off the west end of the farm of H. C. Asberry." The record showed that Asberry's land was situated on the north side of Clinch mountain in Little valley, in Tazewell county; and the location of the Ratliff and Mitchell tracts, and the western boundary of Asberry's land were well known to the parties. Thus, we have a definite boundary of the one hundred acres to be cut off, on the north, south and west; and the circuit court correctly held that the remaining line, the east line, should be run due north and south (from the Ratliff land on the north to the Mitchell land on the south), so as to include one hundred acres. Accordingly, the county surveyor of Tazewell county was directed to go upon the land described in the contract, and lay off the one hundred acres as indicated above, and report. It is not perceived wherein this description is insufficient to enable the one hundred acres to be definitely and accurately located.

It is well settled, that "Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury (in this instance by the court) by the aid of extrinsic evidence." *Reusens v. Lawson*, 91 Va. 226, 235, 21 S. E. 347, 349.

In the present case, the contract supplied the necessary data, and the ascertainment of the correct location of the eastern line was merely a question of surveying.

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In *Warren v. Makely*, 85 N. C. 12, the following description was held sufficient to identify the part to be cut off as a distinct tract: "100 acres lying in Currituck township, near the head of Smith creek, it being the easternmost portion of the farm purchased from my brother and known as the Russell land."

In *Bank v. Catzen*, 63 W. Va. 535, 60 S. E. 499, it was held: "The terms 'eastern one-half', in a deed conveying one-half of a tract of land, in the absence of admissible parol evidence, disclosing a different intention, would mean the eastern half, formed by a line to be run due north and south through the tract." See also, *Lavis v. Wilcox*, 116 Minn. 187, 133 N. W. 563; *Robinson v. Taylor*, 68 Wash. 351, 123 Pac. 444, Ann. Cas. 1913 E, 1011; *Schmitz v. Schmitz*, 19 Wis. 207, 88 Am. Dec. 682.

The language of the contract, giving the north and south boundary, and providing that the one hundred acres be cut "off of the west end of farm of H. C. Asberry," necessarily imports that the east line must run due north and south, since no other course would satisfy the language of the contract.

2. The remaining question is, whether or not an infant can compel specific performance of a contract for the sale of land made with an adult, based on the consideration that he should pay all expenses of the latter at a hospital and maintain him during his natural life, which covenants the infant had performed.

If appellee had been an adult when the contract was entered into with his grandfather, it could not have been specifically enforced by either party while it remained executory on both sides, because of want of mutuality in remedy. Part of appellee's consideration involved the performance of personal services for the grandfather; and in such case a court of equity will not decree specific performance, because it cannot look after the rendition of personal

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services. *Eaton on Eq.*, 536; *Newman v. French*, 138 Iowa, 482, 116 N. W. 468, 18 L. R. A. (N. S.) 218, 128 Am. St. Rep. 212; *Iron Age Pub. Co. v. Telegraph Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

The rule, however, is otherwise where, by the performance of the services contracted for, the contract becomes mutual in obligation and remedy. The reason for the refusal being no longer in existence when the suit is brought, specific performance in such case may be decreed. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907; *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Denler v. Hill*, 123 Ind. 68, 24 N. E. 170.

Want of mutuality is said to be the only reason assigned why a court of equity will not decree specific performance of a contract at the suit of an infant. *Flight v. Bolland*, 4 Russ. 298; *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900; *Tarr v. Scott*, 4 Brewst. (Pa.) 49.

In *Seaton v. Tohill*, 11 Colo. App. 211, 53 Pac. 170 (cited in 36 Cyc. 629, n. 40), the court said in part: "This was a suit instituted by the infant, and its sole aim and object was to compel the adult defendant to specifically perform her agreements in a contract which it was manifestly to the benefit and interest of the plaintiff to have performed. Moreover, it was apparent from the allegations in the complaint that a failure to enforce the contract would result in serious pecuniary loss to the infant. The defendant alone was seeking to evade the contract and was allowed to do so by reason of the non-age of the plaintiff. According to every rule of law applicable to infancy, this was a case which called for the interposition of the court in its favor.

"The judgment was erroneous for another reason. The contract was completed on the part of the infant plaintiff. Nothing whatever remained to be done by him under the terms of the agreement. Upon the refusal of the defendant to accept the money which he was obliged to pay, and which

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he had tendered, he had paid it into the court for her benefit."

That case is very similar in its facts to this case, and the decision rests on two grounds: First, that it was beneficial to the infant to have specific performance of the contract; and, second, that the contract on his part had been fully performed. In that case, the prayer was for the assignment of a lease, while in this case it is for the transfer of title to real estate. There seems to be no difference in principle between the two cases.

It is said in 36 Cyc. 629: "Specific performance of an infant's contract at his suit is refused, in England, on the ground that there is no mutuality of remedy; but this ruling has not been universally followed in this country, since it enables the other party to the contract to take advantage of the plaintiff's infancy, and thus contravenes the general policy of the law relating to infants' contracts. After the infant becomes of age, he may enforce in equity, contracts made by him during his minority; the fact that they were previously voidable by him is no defense."

In answer to the suggestion that specific performance should be denied in this class of cases, because infants' contracts for the purchase of real estate cannot be affirmed during their minority, in 22 Cyc. 699 (referring to statutes similar to section 3424 of our Code) it is said: "Even independent of statute it has been held that a judgment irregularly obtained against an infant may be set aside after he has become of age, but in many jurisdictions the statutes give to an infant against whom a judgment or decree has been rendered, a certain time after obtaining majority within which he may show cause against or proceed to vacate it. Such a statute has also been held not applicable to a judgment in an action in which the complaining infant was the actor, and in the absence of fraud or collusion, a decree rendered in an infant's favor on a bill by next friend,

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whether involving real or personal estate, cannot be reopened by an infant."

Even in cases where infants were defendants, as a general rule, it has been held that they are as much bound by decrees as an adult, and can only impeach them for causes for which an adult could, such as fraud, collusion, error, or the like. With stronger reason must this be true when the decree is in favor of the infant and in a suit in which he is plaintiff. *Brown v. Armistead*, 6 Rand. (27 Va.) 594; *Zirkle v. McCue*, 26 Gratt. (67 Va.) 517; *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; *McComb v. Gulkerson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944, 18 Ann. Cas. 1027.

In construing section 3424, our decisions hold that, "The right of an infant to show cause against a decree which affects his interest, after he arrives at age, must be limited to extend to cause existing at the rendition of the decree, and not to such as arose afterwards." *Walker's Ex'or v. Page*, 21 Gratt. (62 Va.) 636; *Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383.

At the time of the institution of the suit, appellee having fully performed the contract on his part, there was no want of mutuality of obligation and remedy, and specific performance was rightly decreed.

For these reasons, we are of opinion that the decree of the circuit court should be affirmed.

Affirmed.

Syllabus.

Staunton.

AWTREY V. NORFOLK AND WESTERN RAILWAY COMPANY.

September 20, 1917.

1. DEAD BODIES—*Right of Burial—Interference with Right.*—The near relatives of a deceased person have a legal right to the solace of burying the body, and any interference with that right, whether by mutilation of the body after death, or by withholding it from the relatives, is actionable.
2. DEAD BODIES—*Right of Burial—Interference with Right.*—The dead body of the son of the plaintiff was found upon the railroad of the defendant in a mutilated condition. At some time during the morning that the body was discovered it was taken charge of by the coroner, under the statute (Code, 1904, section 3938, amended Acts 1910, p. 338). After the coroner had completed his duties, he, as required by section 3946, Code, 1904, in view of the fact that the deceased was a stranger, caused his body to be decently buried. There were found on the body letters which indicated the address of the dead man's mother and brother in Georgia. The railway employees knew of these letters and replaced them upon the body. The coroner, in about two weeks, notified the relatives in Georgia, and the mother came to Virginia, disinterred the corpse and gave it burial in Georgia.

Held: That under these facts an action for damages did not lie against the railway company. While there is a common law duty resting upon one who finds a dead stranger upon his premises to give him decent burial, it cannot be charged in this case that the company has failed in any such duty, because under the Virginia statute the coroner intervened and performed the duty which would otherwise have rested upon the company.

8. DECLARATION—*Argumentativeness—Interference with Right of Burial.*—The declaration alleged that the employees of the defendant railway company discovered, and left where found, the dismembered portions of the body of deceased, plaintiff's son, on the company's right of way; that the railroad's employees found upon the body of deceased letters showing the address of

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his mother and brother; "and plaintiff avers that it became and was the duty of said defendant to follow up the information contained in said letters, and to notify deceased's said relatives, including plaintiff, of his death; to collect and prepare for burial, in a proper way, dismembered portions of the body of deceased; not to withhold from plaintiff the possession of said body; and to notify his said relatives, including plaintiff."

Held: That the declaration was demurrable because argumentative. There is no allegation here of any withholding of the body, and indeed that allegation could not have been made under the admitted facts of the case. It is simply argued that by failing to notify the plaintiff the company thereby withheld the body.

4. DAMAGES—*Mental Anguish*.—There can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another.

Error to a judgment of the Circuit Court of Washington county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Gilmer & Stant, for the plaintiff in error.

Widener & Potts, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The plaintiff in error, Mrs. S. C. Awtrey, complains of a judgment sustaining a demurrer to her declaration in an action against the Norfolk and Western Railway Company, the defendant in error.

The substance of the complaint is thus stated in the petition for the writ of error:

"The declaration complained of a failure on the part of the defendant to properly collect and prepare for burial the

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dismembered portions of the body of plaintiff's son, who was killed by a train of the said defendant company, and for failure to notify plaintiff of her said son's death, thereby withholding from her the body of her said son, and depriving her of the solace and comfort of properly burying same."

The action is based upon an established common law doctrine. It is well settled that the near relatives of a deceased person have a legal right to the solace of burying the body, and that any interference with the right, whether by mutilation of the body after death, or by withholding it from the relatives, is actionable.

In *Finley v. Atlantic Transport Co.*, 90 Misc. Rep. 480, 153 N. Y. Supp. 440, in which a steamship company was charged by a son with burying his father's body at sea when the ship was almost in port, although the company had already embalmed the body, had enough of his money to pay all expenses incurred, and from documents found in the possession of the father knew the son's address, a demurrer to the complaint was overruled and it was held that the action would lie. In a carefully considered opinion by Shearn, J., the cases are collected and the doctrine reiterated. It will be noted, however, in this case that the son was forever denied the privilege of burying his father, because the steamship company unnecessarily buried the body at sea.

In *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, the action was brought by a widow for the wrongful mutilation and dissection of her husband's body, and the plaintiff was allowed to maintain the action. The doctrine is also well stated in 8 R. C. L. 695-696; *Keyes v. Konkel*, 119 Mich. 550, 78 N. W. 649, 44 L. R. A. 242, 75 Am. St. Rep. 428; *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 95 N. E. 695, Ann. Cas., 1912 D. 1238.

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The conceded facts in this case are, that the dead body of the son of the plaintiff was found upon the railroad of the defendant in a mutilated condition on the morning of the 30th day of August, 1915; that at some time during that morning the body was taken charge of by the coroner, under the statute (Va. Code, 1904, § 3938 amended by Acts 1910, p. 338), which requires such coroner, upon notice of a "sudden, violent, unnatural or suspicious death, to view the body and make inquiry into the circumstances of the death," etc. It seems to be probable that the servants of the railway company allowed the body to remain undisturbed for a few hours until the coroner had been notified, under the view that it would be unlawful for any person to disturb it until after the coroner came. While this is a mistaken view of the law, at the same time it is held by many persons, and it is undoubtedly true that in many cases it is proper that nothing should be disturbed until all of the physical facts can be judicially ascertained by the coroner (*Forde's Case*, 16 Gratt. [57 Va.] 552), and in order to secure the available evidence to aid the authorities in determining whether the death was due to accident or to crime.

In this case there appears to have been no unusual delay. After the coroner had completed his duties, he, as required by section 3946, in view of the fact that the deceased was a stranger, caused his body to be decently buried.

It further appears that there were found on the body certain letters which indicated the address of the dead man's mother and brother in Georgia, and that the railway employees knew of these letters and replaced them upon the body. The coroner subsequently, in about two weeks, notified the relatives in Georgia, and the mother came to Virginia, disinterred the corpse and gave it burial in Georgia in accordance with her own views of propriety.

These facts disclose no conduct on the part of the railway company which subjects it to an action for damages.

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The declaration is also demurrable because argumentative, the allegation being that the employees of the railway company "discovered, and left where found, the dismembered portions of the body of the deceased on said railway company's tracks, roadbed and right of way; that there were letters and other papers on the person of said deceased, showing the name and address of his mother, the plaintiff, and of his brother; and that said servants and employees found said letters upon the body of said deceased. And plaintiff avers that it became and was the duty of said defendant to follow up the information contained in said letters, and to notify deceased's said relatives, including plaintiff, of his death; to collect and prepare for burial, in a proper way, dismembered portions of the body of deceased; not to withhold from plaintiff the possession of said body; and to notify his said relatives, including plaintiff, who avers that she had the right to the care and custody of the body of her said deceased son."

There is no allegation here of any withholding of the body, and indeed that allegation could not have been made under the admitted facts of the case. It is simply argued that by failing to notify the plaintiff the company thereby withheld the body. There can be no right of action in such a case unless there is some affirmative act on the part of the defendant, such, for example, as the act of the steamship company above referred to in unnecessarily burying the body of a passenger at sea and thereby withholding it from his son and thus depriving him of his right to give it such burial as he deemed proper. While there is a common law duty resting upon one who finds a dead stranger upon his premises to give him decent burial, it cannot be charged in this case that the company has failed in any such duty, because under the Virginia statute the coroner intervened and performed the duty which would otherwise have rested upon the company.

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While there was on the part of the coroner an unreasonable delay in notifying the relatives in Georgia of the decedent's death, and while the agents of the company may be properly subject to some criticism for failing to do so, it cannot be said that any legal right of the plaintiff has been interfered with, for as a matter of fact she did ultimately exercise her right to bury her son, and at no time did the defendant company after his death either mutilate his body or withhold it from her possession.

The plaintiff's real grievance is her mental anguish because of the tragic death of her son and the heartrending and deplorable circumstances of his burial in Virginia, but, under well settled principles, she cannot recover for this, because there can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another. *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919; *C. & O. Ry. Co. v. Tinsley*, 116 Va. 603, 82 S. E. 732.

We are of opinion that there is no error in the judgment of the trial court.

Affirmed.

Syllabus.

Staunton.**BARSA V. KATOR.**

September 20, 1917.

Absent, Burks, J.

1. **NEW TRIAL**—*Newly Discovered Evidence*.—In order to afford a proper ground for granting a new trial, the newly discovered evidence must have been discovered since the former trial; be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial; must be material in its object, and not merely cumulative, corroborative and collateral; must be such as ought to produce, on another trial, an opposite result on the merits; and must go to the merits of the case, and not merely to impeach the character of a former witness. Unless these circumstances concur a new trial is never granted on the ground of after discovered evidence, and even where they do concur a new trial is granted only with great reluctance and with special care and caution.
2. **NEW TRIAL**—*Newly Discovered Evidence—Case at Bar*.—Plaintiff brought an action of assumpsit against defendant to recover a balance claimed by plaintiff to have been due him by defendant upon a correct settlement of accounts growing out of numerous transactions between them. Plaintiff was engaged in the business of a peddler, for which defendant furnished him credit, buying goods from wholesale houses for plaintiff and turning over the goods to him from time to time as he needed them. Defendant claimed that plaintiff secretly carried away goods from his room in defendant's apartment, credit for which should have been given by plaintiff to defendant. Defendant in his testimony stated that plaintiff left his house with such goods. A witness for defendant testified that he saw the goods in question before the plaintiff left the home of defendant, described what kind of goods they were, fixed their value, and stated that plaintiff took two or three loads the day he moved out; that the plaintiff took the goods and went out, witness staying in the house. Plaintiff in rebuttal testified in effect that he had no goods whatever left in his hands at the termination of his transactions with defendant, and denied that he had any goods for some time afterwards. Upon a

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Verdict for plaintiff defendant moved for a new trial, on the ground of after discovered evidence. The alleged after discovered evidence consisted, as shown by their affidavits, of the testimony of several witnesses, none of whom were witnesses on the trial of the case, that they saw plaintiff carrying goods through the streets from the defendant's house after the close of the transactions between plaintiff and defendant. Other witnesses made affidavit that they would testify that they heard plaintiff shortly after the close of his transactions with defendant say that he had goods of large value in his possession.

Held: That the after discovered evidence in question was not cumulative, nor merely corroborative, nor collateral, nor in impeachment of former witnesses, but falls within all the rules governing the subject, as set forth in the first syllabus.

3. **NEW TRIAL—Newly Discovered Evidence—Cumulative.**—Although the newly discovered evidence may tend to prove the same issue as the evidence introduced on the former trial, yet if dissimilar in kind, it is not cumulative. In the instant case the fact testified to by the defendant and his witness tended to prove the same proposition which the after discovered evidence tended to prove, namely, that there were goods in possession of the plaintiff derived from his transactions with the defendant and for which the latter should have had credit; the former evidence consisted of the bare statements of the fact of the existence of such goods and of the plaintiff having left the home of defendant with them or of his having carried them away; the latter evidence was more specific, stated facts attending the carrying away of the goods, subsequent in point of time to the status of the case on the subject of the existence of the goods as left by the testimony on the former trial, showed that the conveying away was secretive, also was positive proof, if true, of the place to which the goods were taken, etc. In short was more circumstantial and was evidence of a different kind and character from that introduced on the subject of the goods at the former trial.
4. **NEW TRIAL—Newly Discovered Evidence—Due Diligence.**—Where a witness whose testimony is relied upon as newly discovered, although a relative of the party seeking the new trial, had for ten months prior to the trial been living in another State, and was living there at the time of the trial, and the character of a material part of his evidence was such that it was not probable that by the exercise of reasonable forethought it would have occurred to the party to inquire of the witness concerning it, the non-production of his testimony at the trial does not show a want of diligence.

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Error to a judgment of the Circuit Court of Wise county, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

R. T. Irvine, for the plaintiff in error.

Vicars & Peery and *Morton & Parker*, for the defendant in error.

SIMS, J., delivered the opinion of the court.

This case is an action of assumpsit by the defendant in error—hereinafter referred to as plaintiff—against the plaintiff in error—hereinafter referred to as defendant—seeking to recover a balance of \$1,544.50 claimed by plaintiff to have been due him by defendant upon a correct settlement of accounts growing out of numerous transactions between them, extending through a period of about two years, during which the plaintiff claims to have paid over to defendant an aggregate of some \$10,800.00. The plaintiff was engaged in the business of a peddler, for which the defendant furnished him credit, the latter buying goods from wholesale houses for plaintiff, turning over the goods to him from time to time as he needed them, and the plaintiff, as he came in from his peddling trips, turning over money in small sums to defendant; and there were certain deposits of money in bank by plaintiff to the credit of defendant, during an absence of defendant and also the purchase of a lot of land by defendant for plaintiff and payments of purchase money therefor in installments and there were other alleged transactions between them.

Both plaintiff and defendant are Syrians and for the

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most part so were the witnesses in the case on its trial, the character and veracity of many of them being made the subject of question in the case.

There was a trial by jury resulting in a verdict for the plaintiff for said sum of \$1,544.50, which the defendant, at a subsequent term, moved the trial court to set aside on the grounds of after discovered evidence and of improper conduct of the jury. Affidavits were filed for and against such motion and the court overruled the motion and entered judgment for the plaintiff in accordance with the verdict of the jury. This action of such court is made the sole assignment of error in the case.

A number of instances of after discovered evidence are relied on to sustain said motion, as well as the alleged misconduct of the jury, but in the view we take of the case, only the after discovered evidence bearing upon one issue need be considered, and the other instances of alleged after discovered evidence and the alleged misconduct of the jury need not be considered.

The incident upon which the after discovered evidence which we will consider bears, is that of the carrying away by plaintiff of goods from his room in defendant's apartments, partly by night and in a secretive way by day. These goods, if they were so carried away, were a portion of those obtained by plaintiff of defendant as aforesaid, and were in the hands of the former at the close of his transactions with the latter and credit for their value should have been given by the plaintiff to defendant. Their value was claimed by defendant to be not less than eight or nine hundred dollars. The plaintiff gave the defendant no credit whatever for any of such goods. In his testimony in the case on his first examination the plaintiff made no mention of his having or not having any goods on hand at the close of his transactions with defendant, stating the transactions between himself and the defen-

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dant, and the result of them, as if there were no goods whatever left in his hands at the close of such transactions derived by him from the defendant. In his testimony in the case, in his own behalf, the defendant first made mention of his claim that the plaintiff had on hand at the close of the transactions aforesaid such goods, and that he left defendant's home with such goods of "not less than eight or nine hundred dollars" value. Defendant in his testimony on this subject stated the bare fact that plaintiff left his house with such goods. Frank Carter, a witness for defendant, testified on this subject that he saw the goods in question before the plaintiff left the home of defendant, describing what kind of goods they were, fixed their value, in his judgment, and stated that the plaintiff "took two or three loads (the) day he moved out." That witness was in defendant's home at the time. That the plaintiff "took the goods and went out," witness staying in the house. "He come in and took the goods and leave the room and come back after another load." That witness *thought* plaintiff took the goods to Mike Barsa's, but that he didn't know where he took them.

The plaintiff in rebuttal testified in effect that he had no goods whatever left in his hands as the result of the transactions between him and the defendant and denied that he had any goods for some time afterwards until he got credit from another Syrian and began peddling in a small way, at first with two dozen hose, then with some old country pictures.

The alleged after discovered evidence, which we shall consider as aforesaid, consists, as shown by their affidavits, of testimony which will be given, if they are allowed to testify, by five witnesses, none of whom were witnesses on the trial of this case, namely: H. R. Stone, G. C. Young, F. M. Strong, a Justice of the Peace, F. A. Mahan,

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and Joe Hannie. Briefly stated, this testimony, in so far as it would bear on the issue of fact in question, would be, in effect, as follows:

Stone would testify that at the time in question, following the "split up" between plaintiff and defendant, he saw the plaintiff "make several trips from George Barsa's" (the defendant) "to Mike Barsa's carrying a peddler's pack each time, which seemed to be filled as much as usual. On that occasion I saw him take several loads a day and he then went along the alley immediately in the rear of the stores and between the stores and the railroad. I also saw him take one or more loads in the night time from George Barsa's to Mike Barsa's along Main street, but whenever he went in the day time he seemed to go the back alley."

Young would testify that at the time in question, "one night about eleven o'clock" he saw the plaintiff pass "down the street in the direction of Mike Barsa's house with a big pack on his back."

Strong would testify that at the time in question the plaintiff came into the place of business of F. A. Mahan and he "heard Mahan say to him in substance that he ought to set up a store for himself as he had plenty of goods," and that plaintiff said: "I have got plenty of goods but I don't want no store." That to a question of Mahan which Strong thought was whether plaintiff was moving down to Mike Barsa's, the plaintiff answered "yes."

Mahan would testify that at the time in question plaintiff was in his butcher's shop and told him that "he was going tomorrow and go down to Mike Barsa's" and that affiant Mahan said to the plaintiff: "Toney, you seem to have plenty of goods, you ought to set yourself up a store," to which the plaintiff replied: "I have got plenty of goods,

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but I don't want no store." That plaintiff said he "was going to move down to Mike Barsa's and take his goods there."

Joe Hannie would testify that at the time in question the plaintiff moved the goods in question "to Mike Barsa's and I helped him some in moving. I asked him at one time how much goods he had. He said about \$1,000.00 worth. I asked him to sell me \$100.00 worth for me to peddle with and told him I would pay him cash money, but he said no, he would not sell them to me. I asked him if they were not his goods and if Mr. Barsa had any interest in them. I thought maybe he had not paid Mr. Barsa for the goods, and he said no, they were all his goods, that he had paid Mr. Barsa for them and he did not owe Mr. Barsa anything on them and he said Mr. Barsa did not owe him anything. He said Mr. Barsa had quit buying goods for him. I carried two loads to Mike Barsa's for him. One time in the day I went with him and we went down the back alley between the houses; the next time was in the night and we went down Main street to Mike Barsa's store. Both times I turned over my load to Mike Barsa and he took them into the house."

The defendant by his affidavit states in substance that he had no knowledge of said after discovered evidence at the time of the trial and could not by the exercise of reasonable diligence have obtained such knowledge.

Mike Barsa in a counter affidavit stated that the plaintiff brought no goods to his place.

The rules on the subject of granting a new trial are well settled. As stated in 2 Barton's L. Pr., p. 734, in order to afford a proper ground for granting a new trial the evidence—

"1. Must have been discovered since the former trial;

"2. Be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial;

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"3. Must be material in its object, and not merely cumulative, corroborative and collateral; and

"4. Must be such as ought to produce, on another trial, an opposite result on the merits;

"5. Must go to the merits of the case, and not merely to impeach the character of a former witness.

"Unless these circumstances concur a new trial is never granted on the ground of after discovered evidence, and even where they do concur a new trial is granted only with great reluctance and with special care and caution."

It appears not only from the affidavit of the defendant but also from the nature of the said after discovered evidence itself, above noted, that such evidence falls within all of the rules above stated. (See also authorities cited on this subject in 10 Encyl. Dig. Va. & W. Va. Rep., pp. 447-451.)

It is contended for plaintiff that as Joe Hannie "was a relative of defendant, engaged also in peddling, lived at Jenkins, scarcely thirty miles from Appalachia" (the home of defendant) "it is unreasonable to suppose that the defendant did not or could not have known of such information as is submitted by" this affiant, "long before the trial; especially is this true when it is considered that this case had been pending for over two years." But for ten months prior to the trial this affiant had been living at "Jenkins," (which is in Kentucky); was living there at the time of the trial, and hence he had been for this time living away from the defendant and the character of a material part of this evidence is such that it is not probable that by the exercise of reasonable forethought it would have occurred to the defendant to inquire of this affiant concerning it.

It is contended for plaintiff that the entire evidence above noted is purely cumulative, corroborative and in impeachment of former witnesses and that it does not in any sense go to the real merits of the controversy, and could not by any possibility produce on another trial any result

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other than that reached by the jury in this case. In this connection it should be noted that no witness on the trial of the case testified to the same kind and character of facts as those which are covered by the afterdiscovered evidence aforesaid.

As said by Christian, J., in delivering the opinion of this court in *St. John's Ex'or v. Alderson*, 32 Gratt. (73 Va.) 140; “* * * The kind and character of facts offered as newly discovered evidence make the true distinction. The facts offered may tend to prove the same issue,” (as the evidence introduced on the former trial) “and yet be so dissimilar in kind as to afford no pretence for saying they are merely cumulative.”

Again, quoting from the case of *Guyot v. Butts*, 4 Wend. (N. Y.) 579, the same learned judge in such opinion says: “* * * The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative. But we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled. The kind and character of the facts make the *description*” (evidently a misprint, for *distinction*). “It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar as to afford no pretence for saying they are cumulative.” See monographic note 32 Gratt. Va. Rep. Anno., p. 60, and authorities cited.

So in the instant case while the statement of fact testified to by the defendant and his witness, Carter, tended to prove the same proposition which the after discovered evidence aforesaid tended to prove, namely, that there were goods in possession of the plaintiff derived from his trans-

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actions with the defendant and for which the latter should have had credit, the former evidence consisted of the bare statements of the fact of the existence of such goods and of the plaintiff having left the home of defendant with them or of his having carried them away; the latter evidence was more specific, stated facts attending the carrying away of the goods, subsequent in point of time to the status of the case on the subject of the existence of the goods as left by the testimony on the former trial, showed that the conveying away was secretive, also was positive proof, if true, of the place to which the goods were taken, etc., in short was more circumstantial and was evidence of a different kind and character from that introduced on the subject of the goods at the former trial.

Again: The admissions of the plaintiff alleged in the affidavit of Hannie is not cumulative but independent evidence. *Preston v. Otey*, 88 Va. 491, 14 S. E. 68.

The after discovered evidence in question was therefore not cumulative. Nor, for the same reasons, was it merely corroborative, or collateral, or in impeachment of former witnesses.

On the question of whether the newly discovered evidence under consideration ought on another trial to produce an opposite result on the merits, it seems to us manifest that if true it ought to do so. It bears directly on the issue of an important fact in the case, going to the extent of \$800 or \$900 reduction of the verdict of \$1,544.50, if found to be true. It is supported by affidavits of witnesses, several of whom are not Syrians and who seem to be men of character and standing and free from all prejudice or interest in the case. If this evidence is true, a manifest injustice has been done the defendant. Hence, while this court is reluctant and indisposed to come to a different conclusion from that of a trial judge in the exercise of the discretion vested in the latter in the matter of granting or

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refusing to grant a new trial, we are constrained to reach a different conclusion in the case before us from that reached in the court below, and it seems to us that a jury should pass upon the credibility of the after-discovered evidence aforesaid.

Therefore, for the foregoing reasons we are of opinion that there was error in the action of the trial court in refusing to grant a new trial, and the judgment for that reason must be reversed.

Reversed.

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Staunton.

BLAIR V. BROADWATER.

September 20, 1917

1. AUTOMOBILE—*Dangerous Machine—Negligence Per Se.*—An automobile is not such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous *per se*.
2. AUTOMOBILES—*Parent and Child—Master and Servant—Case at Bar.*—In an action for damages against a father by plaintiff, who was struck by an automobile owned by the father and operated by his daughter, a minor nineteen years of age, the evidence showed that the father bought and kept the car for the use and pleasure of himself and family. He was a deputy sheriff, and also used the car sometimes in the discharge of his official duties. The daughter was a careful and experienced driver, and on the day of the accident she sought and obtained permission from her father to use the car that afternoon for the pleasure and entertainment of herself and her cousin. It affirmatively appeared that the daughter was not using the car on any errand or business of the father.

Held: That the relationship standing alone does not render the father liable for the acts of his minor daughter; that such liability must result from the relation of master and servant or principal and agent, and the absence of that element of responsibility in this case affirmatively appears.

Error to a judgment of the Circuit Court of Scott county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

W. S. Cox and J. P. Corns, for the plaintiff in error.

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Coleman & Carter, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

Plaintiff in error, Blair, while walking along a public highway near Gate City, was struck by an automobile owned by Broadwater and operated by his daughter, a minor nineteen years of age, and brought this action to recover damages from the father for the alleged negligence of his daughter.

The evidence showed that Broadwater bought and kept the car for the use and pleasure of himself and family. He was a deputy sheriff, and also used the car sometimes about the discharge of his official duties. The daughter was a careful and experienced driver, and on the day of the accident she sought and obtained permission from her father to use the car that afternoon for the pleasure and entertainment of herself and her cousin. It affirmatively appeared that the daughter was not using the car on any errand or business of the father, but was driving it alone for the pleasure and entertainment of herself and friend.

The controlling question in the case is presented by opposing instructions requested by the plaintiff and defendant, respectively. The instruction offered by the former embodied the proposition that if the defendant purchased the automobile for the use and pleasure of himself and family, and at the time of the accident his daughter was a member of his family and under twenty-one years of age, and was using the automobile for her own pleasure and the entertainment of her friend, with the knowledge and consent of the defendant, then the defendant was liable for the negligence of his daughter to the same extent and in like manner as if he, personally, at the time of the accident, had been driving the automobile. The opposing instruction requested by the defendant, in effect, was, that

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in order to render the defendant liable for the negligence of his daughter, it must have appeared by a preponderance of the evidence that, at the time of the accident, she was operating the automobile in transacting some business, or in the management of some affair of the defendant and by his authority.

The court rejected the prayer of the plaintiff and gave the instruction requested by the defendant, which ruling resulted in a verdict and judgment for the defendant.

Two theories are advanced why the owner of an automobile should be liable for injuries inflicted upon third persons by his minor child while using the machine, with his consent, for the child's own business or pleasure, namely:

1. Because the parent is responsible for intrusting a dangerous machine to the hands of his child. This liability, it will be observed, does not depend upon the child's negligence, but upon that of the parent in permitting the child to use a dangerous instrumentality.

2. The second theory proceeds upon the assumption that as the parent originally purchased the machine for the use and pleasure of the family, the use of it by the child with the parent's permission for its own pleasure is but applying it to the business for which it was bought; and, therefore, the child's use of it was for the parent's business.

The first proposition is sufficiently answered by the decision of this court in the recent case of *Cohen v. Meadow*, 119 Va. 429, 89 S. E. 876, where it is held that, "An automobile is not such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous *per se*."

The second proposition is discussed in *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 667, as follows: "It bases the creation of the relation of master and servant upon the purpose

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which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she *ipso facto* became a servant. So that the charge thus in fact left the legal relationship of master and servant out of account, and raised it in name only because the daughter was allowed to drive the machine. In this there was also error."

So, also, in *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, it is said: "It has always been supposed that a person who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916 A. 954, Ann. Cas. 1916 A, 656. The attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that, therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense

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and practical experience, we ought to say that a parent who maintains some article for family use and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification or in debate of the query whether such liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative answer has been given by the courts of some States."

The case of *Cohen v. Meador*, *supra*, though differing in some of its facts, is closely in point to the one in judgment and very instructive. The action was against the father, who owned the automobile, and his adult son who was driving it, to recover damages for personal injuries resulting from the fright of a horse, imputed to the negligence of the son. In the trial court there was a verdict and judgment against both defendants; but on writ of error this court reversed the judgment as to the father, and affirmed it against the son. Kelly, J., in discussing the question of the father's liability, said: "The testimony of the younger Cohen, which in this respect is not contradicted, is that the Cohen family had just returned from Big Stone Gap; that he had driven them in the car; that on his return he left his father and mother and family at the store * * *; that with his two smaller brothers, he had started to put the car up when he met two friends whom he invited to go with him for a ride; that they accepted and he was taking

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them towards West Norton when he struck the horse; that he supposed his father thought he had taken the car to put it up; and that his father did not know that he had the car out at that time. It further appears that E. H. Cohen, up to the time of the accident, had done practically all of the driving of the car for his father and family.

"In this state of the evidence we do not think the judgment against J. Cohen can be upheld. The authorities seem to have established the doctrine that an automobile is not inherently such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous *per se*. David's Law of Motor Vehicles, sec. 11; 2 R. C. L., sec. 34, p. 1190; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, 779, and many cases cited. The liability of the owner, therefore, for injuries occurring while the car is being used by another, depends ordinarily, and in the case at bar, upon whether the familiar rule of agency, known as the rule of *respondeat superior*, applies. Relationship alone does not make a father answerable for the acts even of his minor child, and clearly not so for those of a son, as the one in this case probably was, over the age of twenty-one years. The liability in such cases results, if at all, from the fact of agency, and this fact must be proved. No presumption of agency arises merely from the domestic relationship. See note to *Johnson v. Glidden*, 74 Am. St. Rep. 802, 21 A. & E. Enc. L. (2nd ed.) 1059, 29 Cyc. 1665. * * * As was said in *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, 'Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son. Liability arises from the relation of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the

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master in the execution of his orders or the doing of his work.' See, also, *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296 [19 L. R. A. (N. S.) 335], 131 Am. St. Rep. 667; *Erlick v. Heis*, 193 Ala. 669, 69 So. 530; *Heissenbittel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087; *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87."

The above case makes plain the distinction observed by the trial court in the matter of instructions, and strongly tends to sustain its judgment.

Doran v. Thomsen, *supra*, can hardly be distinguished in its facts, and cannot be distinguished in principle, from this case. In that case the New Jersey Court of Errors and Appeals held: "Where a father was possessed of an automobile which he kept upon his premises, and his daughter, about nineteen years of age, was accustomed to drive it, and did so whenever she felt like it, asking permission to use it when the father was at home, but when not at home took it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine. Held: In an action against the father, where the daughter, in using the machine for her own pleasure in driving her personal friends, negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master; and that a motion for a direction of a verdict for the defendant should have prevailed."

In *King v. New York C. & H. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37, it was said: "Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief, and hold the

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master responsible for the damages sustained." So, in *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285, the court said: "The doctrine of *respondet superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose."

The books abound with cases holding for and against the parent's liability for the acts of his child in this class of cases. The authorities are not reconcilable, and it seems to us that the only safe course to pursue is to revert to first principles and adhere to ancient landmarks, rather than to yield a too ready allegiance to an admittedly new principle sought to be engrafted upon the law of master and servant and principal and agent to meet supposed exigencies of new conditions incident to the advent of automobiles.

The general rule in relation to the responsibilities of a parent for the torts of his minor child is very clearly and succinctly stated in *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761, as follows: "The principles of law which govern this case are plain. A father is not liable for the torts of his minor son simply because of paternity. There must exist an authority from the father to the son to do the tortious act or a subsequent ratification and adoption of it, before responsibility attaches to the parent. * * * The wrongful act must be performed by the son in pursuance of the business, incident, or undertaking authorized by the father before the latter can be held liable. * * * If the act is not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father is not liable. The controlling rules of law are the same whether the business in question concerns the operation of an automobile or any other matter."

The doctrine of these cases impresses us as being sound,

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and they sufficiently illustrate the ruling principle that should govern the case in judgment. Therefore, without prolonging this opinion to review them, we shall content ourselves with citing the following cases in support of our conclusion:

(a) In these cases the child was a minor: *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Ma-her v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926; *McFarlane v. Winters*, 47 Utah 598, 155 Pac. 437, L. R. A. 1916 D, 618; *Johnston v. Cornelius* (Mich.), 159 N. W. 318; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

(b) In these cases the child was an adult: *Heissenbuttel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087; *Reynolds v. Buck*, 127 Iowa 601, 103 N. W. 946.

(c) In these cases the servant of the owner was operating the automobile, but was not transacting the owner's business at the time: *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; *Evans v. Dyke Automobile Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506.

(d) See also, "Annotation—Liability where automobile is being used by a member of owner's family." L. R. A. 1916 F, p. 223, *et seq.*; and *Sultzbach v. Smith*, 174 Iowa 704, 156 N. W. 673, L. R. A. 1916 F, 228.

Resting our decision upon the precise facts of the case in hand, which are practically undisputed, we hold that relationship standing alone does not render the father liable for the acts of his minor daughter; that such liability must

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result from the relation of master and servant or principal and agent; and that the absence of that element of responsibility in this case affirmatively appears.

For these reasons, the judgment of the circuit court must be affirmed.

Affirmed.

Syllabus.

Staunton.

BROTHERHOOD OF RAILROAD TRAINMEN *v.* VICKERS.

September 20, 1917.

Absent, Sims, J.

1. **DECLARATION—*Sufficiency.***—The test of the sufficiency of every declaration is, does it state a case, and does it state the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment.
2. **CONTRACTS—*Interference with Contract Relation—Master and Servant—Declaration—Case at Bar.***—A declaration which alleged wrongful and unjustifiable interference by the defendant with the contractual relation existing between plaintiff and a railroad company, his employer, whereby the seniority rights acquired by plaintiff as an incident to his employment were seriously affected, the result of which was the taking from the plaintiff of regular runs and better pay, and the reduction of his regular monthly pay as brakeman and flagman from \$100.00 to \$20.00, states a good cause of action and measures up to the required standard under the procedure in this State.
3. **WITNESSES—*Character—Witness also a Party—Ante Litem Motam.***—In a criminal prosecution or some other controversy involving the moral character of a party, the evidence must be limited to his general reputation *ante litem motam*; and in such case when a witness is also a party, it would seem that the rule applicable to parties should apply. But when a party is also a witness and his character is not in issue upon the pleadings, and the question of his general reputation for truth and veracity arises in the usual way dissociated from any charge of turpitude, he stands as any other witness, and evidence of his reputation, even up to the time of testifying, is generally regarded as admissible.
4. **WITNESSES—*Character Evidence.***—The fact that witnesses who testify as to the reputation of a witness who is also a party, were parties to the litigation, affects the credibility, but not the competency of the character witnesses.

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5. WITNESSES — *Character — Community — Neighborhood.*—Fellow workmen of a brakeman and flagman on a railroad and other persons with whom he came in daily contact at the termini of the road and along the line of his route, are of his community and neighborhood within the rule that confines testimony as to the general reputation of a witness for truth and veracity to members of the community or neighborhood in which the witness lives.
6. WITNESSES—*Neighborhood.*—A man's neighborhood or place of residence extends for the purpose of impeaching him as a witness as far as he is well known, as far as people are acquainted with him and his character. The impeaching witness must "know his reputation among his general associates."

Error to a judgment of the Corporation Court of the city of Bristol, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

John W. Price, J. C. Wilburn and F. W. DeFriece, for the plaintiff in error.

Gilmer & Stant and Geo. W. Warren, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This was an action of trespass on the case brought by Vickers against the Brotherhood of Railroad Trainmen (who will hereafter be called plaintiff and defendant) to recover damages for the alleged wrongful and unjustifiable interference by the defendant with the contractual relation existing between plaintiff and the Virginia and Southwestern Railway Company, his employer, whereby the seniority rights acquired by plaintiff as an incident to his employment were seriously affected, the result of which

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was the taking from plaintiff of regular runs and better pay, and the reduction of his regular monthly pay as brakeman and flagman from \$100.00 to \$20.00. The trial resulted in a verdict and judgment for the plaintiff for \$1,500.

1. There was a demurrer to the declaration, which the court overruled and that ruling is made the first assignment of error. We think the action of the court in overruling the demurrer was plainly right. The declaration states a good cause of action and measures up to the required standard under the procedure in this State.

In Burks' Pleading and Practice, p. 346, it is said: "The test of the sufficiency of every declaration is, does it state a case, and does it state the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment."

The allegations of this declaration furnish an affirmative answer to each of these queries.

2. The only other assignment of error which calls for special notice involves the ruling of the court in excluding the testimony of a number of character witnesses who were introduced by defendant to impeach the general reputation of plaintiff, who had testified in his own behalf, for truth and veracity. The ruling involved a number of witnesses, the exception to whose testimony is set out in bills of exceptions 4, 5, 7, 8 and 9. After considerable colloquy between the court and counsel for defendant, the court definitely ruled on the question as follows: "In view of the rule laid down in section 1618 of Wigmore on Evidence, volume 2, 'that reputation at any time after a charge published, or other controversy begun, is not admissible,' the court excluded the testimony of this witness."

An examination of section 1618 shows that the court was led into error by failing to observe the distinction drawn by the learned author between proof of the general repu-

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tation of a *party*, and the general reputation of a *witness* for truth and veracity. With respect to the former he observes, "(a) Where the desired character is that of a *party*—for example, the defendant in a criminal charge, the prosecutrix in a rape charge, or the plaintiff in a statutory action for seduction—it is obvious that after the charge has become a matter of public discussion, and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created—a reputation based perhaps in part upon rumors about the very act charged or upon the interested utterances of either party. The safeguards of trustworthiness are here lacking; * * * Accordingly, it is generally agreed that a reputation at any time after a charge published, or other controversy began, is not admissible. * * *

"(2) In the case of a *witness*, the conditions above pointed out do not usually affect his reputation, because his conduct is not the subject of the controversy. Moreover, although a witness may sometimes be so related to the controversy or to the parties as to have suffered in consequence of partisan feeling, yet the situation hardly requires that as a general rule a limitation to reputation *ante litem motam* should be enforced. Accordingly the reputation of a witness, even up to the time of testifying, is generally regarded as admissible. Where the witness is also a party, it would seem that the rule applicable to a party should apply."

As we understand the qualification last above referred to, it means this, that in a criminal prosecution or some other controversy involving the moral character of a party, the evidence must be limited to his general reputation *ante litem motam*; and that in such case "when the witness is also a party, it would seem that the rule applicable to parties should apply." The reason for the qualification would seem to be that otherwise a rule designed to shield a party

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against the *post litem* influence of the prosecution or a charge involving his moral character would practically be abrogated should he exercise the privilege of becoming a witness in his own behalf. In the chapter in which section 1618 occurs, Professor Wigmore is discussing exceptions to the hearsay doctrine, and the qualification to the general rule when the individual whose moral character is directly in issue occupies the dual relation of party and witness only applies when his character is in issue upon the pleadings, and not when the question of his general reputation for truth and veracity arises in the usual way dissociated from any charge of turpitude. In the latter instance he stands as any other witness, and is subject to the general rule and not to the exception. The learned author cites for the qualification, *State v. Marks*, 16 Utah 204, 15 Pac. 1089, and against it *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788; *Commonwealth v. Hourigan*, 89 Ky. 313, 12 S. W. 550; *Renfro v. State*, 42 Tex. Cr. 393, 56 S. W. 1013.

But it is insisted that the evidence was inadmissible for the further reasons that the witnesses were parties to the litigation, and, besides, that they were not acquainted with the general reputation of the plaintiff for truth and veracity in the community in which he lived. The first ground affects the credibility, but not the competency of the witnesses. *Brown v. U. S.*, 164 U. S. 225, 17 Sup. Ct. 33, 41 L. ed. 411.

Plaintiff, as we have seen, was a brakeman and flagman on the Virginia and Southwestern Railway, and the second objection makes the point that his fellow workmen and other persons with whom he came in daily contact at the termini of the road and along the line of his route were not of the community in which he lived. This we conceive

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is a misconception of the rule and the reason upon which it rests. The place of acquiring reputation is not confined to actual residence.

In 30 Am. & Eng. Ency. of Law, p. 1079, it is said: "A man's neighborhood or place of residence extends for these purposes as far as he is well known, as far as people are acquainted with him and his character." The impeaching witness must "know his reputation among his general associates."

The case of *Smith v. United States*, 161 U. S. 85, 16 Sup. Ct. 483, 40 L. ed. 626, is instructive in this aspect of the question. It was there held: "On a trial for murder, where several witnesses who testified that the deceased had the reputation of being a quarrelsome and dangerous character, had been arrested for various offenses, and on one of them convicted, while none of them had kept a gambling place, an instruction to the jury to cast aside as worthless matter such testimony if it comes from 'keepers of dives and gambling houses and gambling hells and violators of law and prison convicts,' with reiterated statements to the effect that men of pure character only are competent to know what character is—is error, and entitles the defendant to a new trial, as the credibility of witnesses is a matter for the jury, and the instruction withdrew this matter from their consideration."

Mr. Justice Gray, in delivering the unanimous opinion of the court, observed: "The character of a quarrelsome and dangerous man is not always so well known to peaceable and law-abiding citizens that their testimony upon the subject can be had. In this, as in other matters involved in the administration of the criminal law, it is often necessary to resort to those who are more familiar with the persons between whom, and in the places in which, quarrels and affrays are apt to take place."

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Those most likely to be acquainted with the general reputation of the plaintiff for truth naturally might be expected to be found among his associates engaged in a common employment. Nor is it an unreasonable construction to hold that the neighborhood of one engaged in local railroading is coextensive with the line over which he works, and that persons with whom he comes in daily contact and with whom he is familiarly acquainted should be classed as neighbors in the true sense of the rule in question.

Upon these considerations, we are of opinion that the trial court erred in excluding the testimony of the witnesses offered by defendant to prove the general reputation of plaintiff for truth and veracity *post litem motam*. For which error the judgment must be reversed and the case remanded for a new trial.

There were other assignments of error, mostly in regard to the ruling of the court on instructions, but they were not pressed and it is unnecessary to consider them as they may or may not arise at the next trial.

Reversed.

Syllabus.

Stamton.

CLINCHFIELD COAL CORP. v. RAY.

September 20, 1917.

1. MASTER AND SERVANT—*Assumption of Risk*.—The servant assumes the risk of dangers which are known to and appreciated by him, or which are ordinarily incident to the service, or are open and obvious, which the law will infer are so known to him.
2. MASTER AND SERVANT—*Assumption of Risk—Changing Conditions*.—The doctrine of assumption of risk applies to changing conditions at the place of work of the servant due to the progress of his work, or to the other operations of the master within view of the servant, but does not apply to other operations of the master than those being performed by the servant, from which the view by the latter of, and the view of him from, such operations was obstructed, and which operations, if properly performed, need not have changed the condition or increased the danger of the place of work. In the latter case the master owes the duty of prevision with respect to what is likely to subsequently occur affecting the safety of the place of work.
3. MASTER AND SERVANT—*Assumption of Risk—Case at Bar*.—Where a servant, a track repairer, was given work by the assistant foreman in charge of a mine, repairing the track between stationary cars left on the track in a mine, it is a non-assignable duty of the master to exercise ordinary care under the circumstances to prevent the moving trips of other cars coming into collision with the cars, left and expected to remain stationary, so as to drive or push them back upon and increase the danger of the plaintiff's place of work. The defendant having failed to place any signal or to otherwise exercise reasonable care to notify its other servants operating the motor and cars with a view to prevent such a collision and result as aforesaid, the subsequent action of such servants resulting in such collision and injury to the servant was but the natural and probable result of such negligence of the defendant. The proximate cause of the injury in such a case was the failure of the master to place any signal or to other-

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wise exercise reasonable care to notify its servants operating its motor and cars, and hence the master is liable in damages for the injurious result to the servant.

4. **MASTER AND SERVANT—Non-Assignable Duty—Character of the Service.**—In the instant case it was urged that there was a distinction with respect to the application of the doctrine of assumption of risks to overhaulers and track repairers, but it is not from the difference in the character of the service that the non-assignable duty of the master to exercise ordinary care under the circumstances to prevent injury to the servant arises, but from the situation and surrounding circumstances in which the servant is placed and the knowledge, actual or constructive, of these factors in the case being brought home to the master.
5. **NEGLIGENCE—Superseding Cause.**—A cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury. The intervention of the derailed car as described in the next syllabus was not a superseding cause of the injury.
6. **MASTER AND SERVANT—Volunteer.**—A track repairer was set to work repairing track in a mine. A miner having loaded a car with coal pushed it out on the track at the place where the track repairer was at work, but owing to a defect in the track the car was derailed. Thereupon the track repairer undertook to put it back upon the track so as to remove it and proceed with his work. While so engaged his leg was caught between this car and an empty car, with which a return trip of cars had collided, jarring the empty car violently back and catching the track repairer between it and the derailed car.
Held: That the track repairer was not a volunteer in the work in his effort to replace on the track the derailed car.
7. **APPEAL AND ERROR—Conclusiveness of Verdict.**—In an action against a master by his servant, a track repairer, for injuries sustained while working in a mine, the verdict of the jury is conclusive on such questions as the contributory negligence of the plaintiff and that the defendant could not have reasonably anticipated a collision resulting in injury to the plaintiff, when the questions were submitted to the jury upon full and fair instructions.

Error to a judgment of the Circuit Court of Russell county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

Statement.

STATEMENT OF THE CASE AND FACTS.

This is a personal injury case in which there was a verdict of the jury in favor of the defendant in error—plaintiff in the court below—against the plaintiff in error—defendant in the court below—who will be hereinafter referred to as plaintiff and defendant.

There was, by the defendant, a demurrer to the declaration, a number of exceptions to the giving and refusing of instructions and a motion to set aside the verdict for misdirection of the jury and because contrary to the law and the evidence. This motion was overruled and the judgment complained of was entered in accordance with the verdict of the jury.

Considering the evidence under the rule applicable thereto in such case, the material facts are as follows:

Facts.

The plaintiff went to work in the mine of the defendant about three months prior to the accident and up to the day of the accident was engaged in digging coal, except a night and day and part of another day in which he was engaged in work done by contract consisting of putting in some switches in the tracks for hauling coal cars in and out of certain entries in the mine. On the day of the accident the plaintiff did his first work as track repairer. The plaintiff worked that morning track repairing in another part of the mine. About noon on this day, the assistant mine foreman, Wright, in charge of the mine, came to and told the plaintiff he wanted the latter to "fix some track and put some (switch) throws in" in the heading of the mine where the accident afterwards occurred. Plaintiff replied, "I will do the best I can." This employment as track repairer was in pursuance of an understanding

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reached between plaintiff and the foreman, about a week before, that plaintiff would do the best he could as track repairer, if called upon to do that kind of work.

Thereupon, just before 1 o'clock on December 27th the plaintiff first went to work putting the switch "throws in" and was engaged in that work when the foreman, Wright, came where the plaintiff was, took the plaintiff with him to a place in the same heading where the track had spread, i. e., where the rails of the track had gotten too far apart for the cars to pass safely over them, showed the plaintiff that the rails needed being brought into gauge, i. e., into the proper distance apart, and directed plaintiff to repair the track accordingly.

This place of work was not on the main line of track in the mine but on a branch line of track running into a drift or heading being worked only about 550 feet long. From the latter heading eleven rooms had been opened, turning off on both sides of it, from which coal was being mined. These rooms were numbered from 1, nearest to the entrance of this drift or heading, to 11, farthest from such entrance. The main track came from the tippie, outside the mine, in a straight line to and then turned off and passed by such entrance, going on to other parts of the mine deeper in it and farther from the tippie. The track in this heading switched off into each room as it passed them at what is called the necks or mouths of the rooms. These necks or mouths of the rooms were 50 feet apart. Room No. 8 was about 400 feet from said entrance and there were beyond it farther on in the said heading only three other rooms, Nos. 9, 10 and 11, so that the heading extended only about 150 feet beyond room 8 and served only three rooms beyond room 8.

Just before the plaintiff was put to work repairing the spread track, the motorman and brakeman in charge of the motor which hauled the empty and loaded coal cars in

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the mine, had taken all the loaded cars on the track in said heading out of the mine to the tippie. They had brought back a trip of empty ears (the number is left uncertain by the evidence, probably fifteen or sixteen) and left some of them beyond the mouth of room 8; and while the foreman was showing plaintiff what he wanted him to do with respect to repairing the track, the motorman and brakeman left the residue of such trip of cars (probably thirteen), along from the mouth of room 8 in the direction of room 5, leaving a space of about two car lengths (18 or 20 feet) opposite the mouth of room 8, between the empty cars thus left. The evidence leaves it uncertain how much space on the track the cars left on the hither side of room 8 occupied.

These empty cars were left on the track in said heading for those mining coal in the said rooms Nos. 1 to 11 inclusive to take into the rooms and load them with coal as they needed them. The method of the miners in taking the empty cars from the heading as needed, loading them with coal and disposing of the loaded cars, was as follows: The miner in each room when an empty car was needed would take it from the track, roll it in the room by hand, load it, then roll it out by hand, on the track in the heading to be later hauled out to the tippie by the motorman and brakeman operating the motor when enough loaded cars had accumulated on the heading track to make a "trip."

Having left the empty cars beyond and on the hither side of the mouth to room 8, as aforesaid, leaving a space opposite the mouth of room 8 of about 18 or 20 feet in width between the empty cars on the track on either side—which space we will hereinafter refer to as the place of work of the plaintiff—the motorman and brakeman with their motor went out of said heading to get other empty cars to

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bring back and finish distributing or placing them along such heading. The later operation is referred to in the record as "placing up" the empty cars.

The method used of putting empty cars on the track in said heading was as follows: They were pushed into the heading by the motor, the empty cars being in front and the motor behind the trip of cars. The rules of the defendant required a light to be on the front of such moving cars.

The operation of "placing up" aforesaid, from the nature of it, was likely to result in a movement of the empty cars left stationary on the track as aforesaid, unless those in charge of such operation were aware at the time of some reason why such a movement should be avoided, even though there was a light on the front of a return trip of empty cars.

The said place of work of the plaintiff and the whole of said heading, and indeed the whole mine, was in darkness, as incident to the normal operation of a mine under ground. The plaintiff and helper had headlights on their caps, but they were insufficient to notify the brakeman or motorman that they were at work between the cars. No one placed any signal to notify the motorman and brakeman of that fact, so as to avoid the probable result of their not knowing or of their forgetting, if they once knew, that some one was working between the cars, namely, a collision with and pushing back of the cars on the track so as to endanger the plaintiff in his place of work.

At said period of time in the operation of the mine and the situation aforesaid, the said foreman, Wright, came with the plaintiff to the place of work of the latter aforesaid and put the plaintiff to work repairing the track as aforesaid.

The foreman then saw the situation at and surrounding such place of work. Thereupon such foreman left the

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plaintiff engaged at work as directed by him as aforesaid, went toward the entrance of the heading, passed on along and out of said heading; saw that no such signal as aforesaid was placed; placed none and ordered none to be placed; met the next return trip of fifteen or twenty empty cars being brought to finish distributing them along the heading, at the entrance to the said heading, and made no effort to caution or warn the brakeman or motorman against the danger of colliding with the stationary cars aforesaid, left standing on the track with the plaintiff at work at his place of work aforesaid between them, or to remind them that the plaintiff was still at work there.

While the motorman and brakeman were gone for such return trip of empty cars, the miners working in rooms 2, 3 and 4, took three of the cars theretofore left on the track as aforesaid, into such rooms, leaving some ten cars stationary on the track between room 5 and the place of work of the plaintiff.

The evidence is conflicting as to whether the brakeman was on the front end of the return trip of cars or some 75 or 100 feet back from such end. In either case, if there had been a suitable signal light for the purpose of notification aforesaid he could have seen it; or if the brakeman or motorman had otherwise been notified as aforesaid by the foreman as the cars passed him as aforesaid, the same purpose would have been accomplished.

The return trip of cars passed on into said heading, where plaintiff was at work, for the purpose of distributing such supply of cars as aforesaid, and in the darkness, there being no light on the end of the stationary cars which they were approaching, or other light or signal otherwise located, to notify the brakeman and motorman that some one was working at the place of work of the plaintiff (and with no light indeed on the front end of the return trip of cars according to the testimony for plaintiff), and the

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brakeman and motorman not then thinking of the fact that the plaintiff might still be in his place of work aforesaid, although they knew before they went out for such return trip that he had undertaken to do the work of repairing the track there, and they not at the time knowing or realizing that the plaintiff was at work as aforesaid, the return trip of cars collided with and jarred back said stationary cars so hard that they were thrown violently back, causing the leg of the plaintiff to be caught and broken.

The brakeman immediately after the accident attributed it to the cause—"I didn't know that you (the plaintiff) were in there; I couldn't see"—or as differently expressed, "I could not see, I did not know you were in there."

There were many and serious conflicts between the testimony for plaintiff and defendant, but the foregoing are the facts on the points referred to, according to the testimony for the plaintiff.

The plaintiff's leg was not caught between the two cars originally left on each side of his place of work. The precise manner in which the injury occurred was as follows:

After the said foreman left as aforesaid, a miner in room 8, having loaded a car he was engaged in loading with coal, pushed it out on the track in the heading where plaintiff was at work. The latter made his escape from this car, but owing to the spread of the track at that place, it derailed. Thereupon the plaintiff and his helper undertook to put it back upon the track so as to remove it and proceed with his work, as he had been urged to complete it, by said foreman, so that the track could be used, and while so engaged his leg was caught between this car and the next empty car on the hither side of room 8 by the jarring back of the cars aforesaid.

There was testimony in the case for the defendant to the effect that it was the duty of the motorman to replace derailed cars by the use of the motor to pull them on the

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track, but the evidence for plaintiff shows that this was unknown to him and could not have been reasonably expected to have been known to him, and that his effort to replace the derailed car on the track was work done in the reasonable discharge of the duties placed upon him by the direction of the defendant through its said foreman and it was reasonably to be expected and foreseen by the defendant that such a casualty might occur and that the plaintiff would so act under the circumstances.

The declaration when considered on the demurrer to it, and the evidence in the case when considered under the rule applicable in this court, does not disclose that the plaintiff knew before the accident that no signal of notification aforesaid would be placed by defendant and that no act would be done by the latter, if called for in the exercise of ordinary care on the part of the defendant, to prevent moving trips of cars endangering his place of work; nor that there was any method in this regard so established in the operation of the mine of defendant with respect to such a situation as that in which the plaintiff was placed, as that it could be considered as the ordinary method of such operation, that no such notification would be given by the defendant, from which the plaintiff's knowledge of such method could be inferred. The whole evidence, including that for the defendant, fails to show that a track repairer had, on any occasion before that in the instant case, been put to work between cars left stationary on the track, obstructing his view of, and the view of him from, an approaching trip of cars. That is to say the situation in which the plaintiff was placed was unusual; no custom with respect to the presence or absence of signals for his protection in such a situation had grown up or existed in the ordinary course of the employment or service in defendant's mine.

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Fulton, Burns & Kidd and Morison, Morison & Robertson, for the plaintiff in error.

Werth & Werth, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The assignments of error, while numerous, raise only a few questions which are material, in the view we take of the case. Such questions will be considered and passed upon in their order as stated below.

The decision of most of the questions raised as aforesaid turns upon the application of the doctrine of assumption of risk.

That doctrine is well settled. The servant assumes the risk of dangers which are known to and appreciated by him, or which are ordinarily incident to the service or are open and obvious, which the law will infer are so known to him.

The chief question which we have to consider is—

1. Were the dangers incident to the place of work of the plaintiff all assumed by him, so that the defendant owed him no duty of prevision with respect to what was likely to subsequently occur affecting the safety of such place, which might be caused, (a) not by changing conditions at the place of work of the servant due to the progress of his work, or to the other operations of the master within view of the servant, but (b) to other operations of the master than those being performed by the servant, from which the view by the latter of, and the view of him from, such operations was obstructed, and which operations, if properly performed, need not have changed the condition or increased the danger of the place of work?

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It is well settled that in cases falling within the class of cases (a) referred to in the above question, the doctrine of assumption of risk applies.

N. & W. Ry. v. Nuckols, 91 Va. 201, 21 S. E. 342; *Hambly's Case*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009, and numerous other cases from other jurisdictions, involving injury to track repairers, cited and relied on for defendant. The same is true of the railroad yard cases of *Pittard's Adm'r v. So. Ry. Co.*, 107 Va. 1, 57 S. E. 561; *N. & W. Ry. v. Belcher*, 107 Va. 340, 58 S. E. 579, and *W. S. R. Co. v. Grove's Adm'r*, 113 Va. 411, 74 S. E. 148, cited and relied on for defendant.

We are of opinion that the instant case falls within the class of cases (b) referred to in the next above question, and that the principle on which rests the case of *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827, is decisive of the question we are considering in favor of the plaintiff. The duty of prevision aforesaid rests upon the master in such a case. It concerns the place of work of the servant and hence is a non-assignable duty of the defendant to exercise ordinary care under the circumstances to prevent the moving trips of other cars coming into collision with the cars, left and expected to remain stationary, so as to drive or push them back upon and increase the danger of the plaintiff's place of work. The defendant having failed to place any signal or to otherwise exercise reasonable care to notify its other servants operating the motor and cars with a view to prevent such a collision and result as aforesaid, the subsequent action of such servants resulting in such collision and injury to plaintiff was but the natural and probable result of such negligence of the defendant. That is to say:

The proximate cause of the injury in the instant case was the failure of defendant to place any signal or to otherwise exercise reasonable care to notify its servants oper-

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ating its motor and cars as aforesaid, and hence the defendant is liable in damages for the injurious result to the plaintiff.

It is urged for defendant that there is a distinction with respect to the application of the doctrine of assumption of risks to overhaulers, as in the *Norment Case*, and track repairers, as in cases cited and relied on for defendant as aforesaid. In principle, it is not from the difference in the character of the service that the non-assignable duty aforesaid arises, but from the situation and surrounding circumstances in which the servant is placed and the knowledge, actual or constructive, of these factors in the case being brought home to the master.

2. Was the intervention of the derailed car a superseding cause of the plaintiff's injury?

It is elementary that a cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury. *City Gas Co. v. Webb*, 117 Va. 269, 84 S. E. 645.

It is obvious, therefore, that this question must be answered in the negative.

3. Was the plaintiff a volunteer in work in the effort to replace on the track the derailed car?

The statement of facts on this subject noted above sufficiently answers this question in the negative.

4. We have not noticed above other considerations urged for the defendant, such as that by the manner in which the plaintiff attempted to restore the derailed car to the track he caused his own injury; that the plaintiff was in effect guilty of contributory negligence because, in the exercise of reasonable care on his part, he might have seen or heard the approaching cars, which caused the collision which resulted in his injury, in time to have avoided that result;

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and that the plaintiff was guilty of such negligence because of various other things. It is deemed sufficient to say that these and all other questions of fact were submitted to the jury upon full and fair instructions to them, and the verdict of the jury is conclusive upon us as to such matters.

5. It is further claimed for defendant that its foreman—and hence the defendant—could not reasonably have anticipated a collision resulting in injury to plaintiff as it occurred—"that the plaintiff would be struck by a car and pinned up against a loaded car which was not at the place when the foreman was there."

This very question of fact was submitted to the jury under two instructions as asked for by defendant, which were extremely favorable to it. The verdict of the jury, therefore, is conclusive on the subject.

For the foregoing reasons we find no error in the action of the trial court and the judgment complained of must be affirmed.

Affirmed.

Syllabus.

Staunton.

CONSOLIDATED TRAMWAY COMPANY, INC., AND OTHERS V.
GERMANIA BANK AND OTHERS.

September 20, 1917.

1. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Deed of Trust Reserving Power of Sale to Grantor.*—A deed of trust provided that until default should be made in the payment of the principal or interest of any of the bonds secured by it, the trustee should permit the grantor to sell the property covered by the deed, provided, however, that in the event of a sale of the property, the proceeds should be reinvested in other property, which should immediately become subject to the deed of trust.

Held: That the absolute power of sale reserved to the grantor in the deed, as a matter of law, rendered it *per se* fraudulent and void, under section 2458 of the Code of 1904.

2. FRAUDULENT CONVEYANCES—*Subsequent and Existing Creditors.*—Transactions which are condemned by section 2458 of the Code of 1904, may be impeached by both prior and subsequent creditors, while such as are included in section 2459 of the Code of 1904 can only be set aside at the suit of existing creditors. Section 2458 deals with fraudulent acts that are void, and, therefore, its operation is not limited to any particular class of creditors. It applies alike to all creditors who are delayed, hindered or defrauded of their rights by the device of the grantor, whether they be existing or subsequent creditors. On the other hand, section 2459 deals with gifts, conveyances, etc., that are voluntary, or upon consideration of marriage, which are only declared to be void as to "creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted * * * after it was made; and though it be decreed to be void as to prior creditors, because voluntary or upon consideration of marriage, it shall not for the cause be decreed to be void as to subsequent creditors. * * *"

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Appeal from a decree of the Circuit Court of the city of Roanoke. Decree for complainants. Appellants appeal.

Affirmed.

The opinion states the case.

Jackson & Henson, Woods, Chitwood & Coxe and Caldwell & Chaney, for the appellants.

Hart & Hart and Horace M. Fox, for the appellees.

WHITTLE, P., delivered the opinion of the court.

On January 1, 1910, appellant conveyed to the Columbia Trust Company, trustee, certain patent rights, an aerial tramway and stock in other tramway companies, to secure a proposed bond issue of \$100,000, to be issued from time to time as the exigencies of the company should demand. On September 12, 1912, appellant conveyed to the same trustee certain real estate in the city of Roanoke, with the buildings and structures thereon and the machinery, implements, tools and fixtures in said buildings. On October 13, 1914, the appellant conveyed to the same trustee the property included in the deed of September 12, 1912, and "also all other property, real and personal and mixed whatsoever and wheresoever situated and now owned or which may hereafter be owned or acquired by the Consolidated Tramway Company, Inc." The two last named deeds were made "subject to all the trusts, provisos and conditions as are set forth in the deed of January 1, 1910." One of the trusts, provisos and conditions in the first deed (to which, as we have seen, the two subsequent deeds were made subject) is as follows: "Until default shall be made in the payment of the principal or interest of any of the bonds hereby

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secured, or any part thereof, as and when the same shall become due and payable, or in the performance or observance of any condition, covenant or requirement of said bonds, or of this mortgage or deed of trust, the trustees shall permit and suffer the Consolidated Tramway Company, Inc., its successors and assigns, to sell, lease, use, possess, operate and enjoy the franchises and property herein mentioned and to receive and use the total incomes, rents, issues and profits thereof, provided, however, that in the event of a sale of any of the franchises or other property hereby conveyed, the proceeds arising from such sale other than the rents, issues and profits therefrom, shall be reinvested in other property, which shall immediately become subject to the conditions of this mortgage or deed of trust."

Chaney, the substituted trustee for the Columbia Trust Company, the original trustee, had advertised the property for sale when appellees, judgment creditors of appellants, filed their bill in the Circuit Court of the city of Roanoke to enjoin the sale and to have the deeds declared null and void, on the ground, among others, that the deeds of trust upon their face, as a matter of law, were fraudulent and null and void as to them and all other creditors of the Consolidated Tramway Company, Inc.

The debts upon which all these judgments were founded were contracted subsequent to the first deed of trust; two of them were contracted prior to the second and third deeds of trust, and the other debt was contracted subsequent to the second and prior to the third deed of trust.

From a decree perpetually enjoining the substituted trustee from executing the trusts because the "advertisement of the sale was fatally defective," and for the further reason that all three of the deeds of trust were fraudulent *per se* as to creditors of the Consolidated Tramway Company, Inc., and annulling the same, this appeal was allowed.

Opinion.

It will be unnecessary to consider the first ground upon which the circuit court rested its decree, since we are of opinion that the second ground is plainly right and is conclusive of the case.

There can be no question, according to the Virginia decisions, and, indeed, from the general course of decision elsewhere, that the absolute power of sale reserved to the grantor in all of these deeds, as a matter of law, renders them *per se* fraudulent and void under section 2458 of the Code.

From the case of *Lang v. Lee*, 3 Rand. (24 Va.) 410, decided in 1825, down to the present time, the proposition has been maintained that, "A deed of trust made by the debtor professedly for the indemnity of certain preferred creditors, reserving to the grantor a power over the property conveyed, inconsistent with the avowed purposes of the trust, and adequate to the defeat thereof, is, because of such reservation, void as to any creditor thereby postponed, and as to purchasers."

In *Perry v. Shenandoah Nat. Bank*, 27 Gratt. (68 Va.) 755, 757, it is said that, "the principal case (*Lang v. Lee*, *supra*) and the doctrine it established had been affirmed and approved in several subsequent cases and may now be held as the settled law of Virginia." See foot-note to principal case, Va. Rep. Ann., 608, where many of the cases are collected.

In *Brockenbrough v. Brockenbrough*, 31 Gratt. (72 Va.) 590, it is said: "There is no doubt that the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent. Such is the case when the grantor reserves a power over the property conveyed incompatible with the avowed purposes of the trust and adequate to the defeat thereof. This principle was enunciated

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in *Lang v. Lee*, 3 Rand. (24 Va.) 410, and has been repeatedly recognized by this court in subsequent decisions." See also notes to section 2458, Va. Code, 1914.

Among the later decisions of this court on the subject we may refer to *Gray v. Atlantic Trust Co.*, 113 Va. 580, 75 S. E. 226, where, as in this case, the reservation is such as to raise a conclusive presumption of fraudulent intent and render the deed *per se* void, and it was held to come within the express interdiction of section 2458, and to be void as to all creditors whose rights are affected thereby.

Section 2458 deals with fraudulent acts that are void, and, therefore, its operation is not limited to any particular class of creditors. It applies alike to all creditors who are delayed, hindered or defrauded of their rights by the device of the grantor, whether they be existing or subsequent creditors. On the other hand, section 2459 deals with gifts, conveyances, etc., that are voluntary, or upon consideration of marriage, which are only declared to be void as to "creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted * * * after it was made; and though it be decreed to be void as to prior creditors, because voluntary or upon consideration of marriage, it shall not for that cause be decreed to be void as to subsequent creditors. * * *"

An examination of the decisions of this court shows that transactions which are condemned by section 2458 may be impeached by both prior and subsequent creditors; while such as are included in section 2459 can only be set aside at the suit of existing creditors.

In 6 Ency. Dig. of Va. and W. Va. Rep. 617, it is said: "There are few decisions in Virginia involving this point exclusively since the enactment of the statute in 1850, Va. Code (1887), sec. 2459. The tendency of the cases seems to be to give the statute its plain and evident meaning, and

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there is no conflicting construction observed. The rule seems settled that in respect to after-existing creditors a fraudulent deed differs from one that is merely void because not upon a consideration deemed valuable in law, in that the former is void as to such creditors, as well as those whose debts were created after the deed was made; while the latter is only void as to antecedent debts, and may be wholly sustained as to those coming into existence after its date." *Broadfoot v. Dyer*, 3 Munf. (17 Va.) 350; *Hutchinson v. Kelly*, 1 Rob. (40 Va.) 123, 39 Am. Dec. 250; *Ruddle v. Ben*, 10 Leigh (37 Va.) 467; *Johnston v. Zane*, 11 Gratt. (52 Va.) 552, 566; *Pratt v. Cox*, 22 Gratt. (63 Va.) 330, 337; *Whitten v. Saunders*, 75 Va. 563; *Johnson v. Wagner*, 76 Va. 587, 590; *McCormick v. Atkinson*, 78 Va. 8, 10; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; *Ferguson v. Daughtrey*, 94 Va. 308, 315, 26 S. E. 822; *Quinn-Marshall v. Whittaker*, 116 Va. 965, 971, 83 S. E. 398.

The same rule seems to prevail in West Virginia. Thus in *Silverman v. Greaser*, 27 W. Va. 550, it is said: "When it is shown that there is fraud in the making of a deed conveying real estate, whether the actual fraudulent intent relates to existing, or is directed exclusively against subsequent, creditors the effect is precisely the same and subsequent as well as existing creditors may for such fraud successfully impeach the conveyance."

The foregoing authorities sustain the proposition that the deeds in this instance, being fraudulent and void as a matter of law, were amenable to attack at the suit of subsequent creditors.

The conclusion we have reached with respect to these deeds imposes no unreasonable or embarrassing limitations upon public service or other corporations. Such corporations in the practical administration of their affairs are not infrequently confronted with the necessity of incurring

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and taking care of large bonded indebtedness, and at the same time to retain such possession of their properties and revenues as will enable them to meet current expenses and discharge their duties to the public. Experience has taught that these purposes may be accomplished without transgressing any rule of law or violating the rights of general creditors; yet, neither such corporations nor private individuals may be permitted under the guise of securing creditors to reserve to themselves the power to defraud them.

The circuit court has rightly decided the questions involved in this litigation, and its decree must be affirmed.

Affirmed.

Syllabus.

Stanton.COOPER'S ADM'R. *v.* COMMONWEALTH.

September 20, 1917.

1. **DOMICIL—Residence—Meaning of the Terms—Statutes—Construction.**—Though frequently so used, "residence" and "domicil" are not synonymous words and *domicil* has the larger significance. The meaning of the word *residence* depends upon the subject matter and connection in which it is used. In general terms it may be said to be the dwelling place of a person, but it may be either his permanent or temporary abode. In the construction of statutes, the meaning of the word *residence* depends upon the context and purpose of the statute. As used in one statute it may clearly refer to a mere business residence, while as used in another it may just as clearly refer to domicil as technically and strictly defined. In determining the meaning of the word in a particular statute, the legislative purpose and the context must be always kept in view.
2. **TAXATION—Residing Therein—Meaning of the Term.**—As used in the Virginia statutes (Code, secs. 491 and 494, as amended Acts, 1915, p. 219), so far as they relate to taxes upon intangible property, having no other *situs* for taxation, the words "residing therein" and the words "residing * * * in his district" can only refer to persons domiciled in the district of the local commissioner of the revenue who makes the assessment, for any other construction would inevitably lead to hopeless confusion and conflict between the different communities in this and in other States, in which the taxpayer might have temporary residences, as well as to multiplied taxation upon the same property.
3. **DOMICIL—Definition—Change of Domicil—Presumptions and Burden of Proof.**—Residence, with no present intention of removal, constitutes domicil. Mere change of place is not change of domicil. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. To constitute a new domicil two things must concur—first, residence in the new locality; second, the intention to remain there. Until the new

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domicil is acquired, the old one remains and whenever a change of domicil is alleged, the burden rests upon the party alleging it.

4. **DOMICIL—Presumptions and Burden of Proof.**—It being established that from his childhood to 1905 a person's domicil was in another State, the burden is upon those who allege change of domicil to establish it.
5. **DOMICIL—Evidence—Voting.**—In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicil, and must be generally, if not universally, supported by the oath of the voter.
6. **DOMICIL—Case at Bar.**—Notwithstanding that a party had lived for seven years in Salem, Virginia; that he had built and, with his family, occupied a handsome dwelling in that town; that he had been an officer and stockholder in a number of Virginia corporations; that in applications for life insurance policies and in certificates to procure charters for corporations, he had stated his residence to be in Salem; that he had become president of the board of trade of Salem; that he had transferred his church membership to a church in Salem; that his children went to the public schools of Salem without the payment of fees required of non-residents, though there was no evidence that he had ever been asked or refused to pay such fees; and that he had purchased burial lots in a cemetery in Salem and removed the bodies of two of his dead children and interred them in these lots; his domicil was in West Virginia, where he had resided prior to his removal to Salem; where the evidence showed that when the subject was discussed, he plainly made it evident that he did not intend to give up his legal domicil in West Virginia; that his chief business and largest property interests were there; that he was postmaster there and apparently desired to continue to hold that office, which he felt he could not do if he changed his domicil; that when asked by the commissioner of revenue of Salem to list his intangible property, he refused to do so and distinctly tendered the issue of fact which is involved to the commissioner of the revenue; that it was his custom to go to West Virginia and remain two or three days, every ten days or two weeks, for the purpose of attending to his business; that he paid his poll tax annually in West Virginia, and voted regularly in that State.

Opinion.

Application under sections 567 and 571. of the Code for the correction and cancellation of tax assessments. Judgment for the Commonwealth. Applicant assigns error.

Reversed.

The opinion states the case.

Jackson, Henson & Saul and Jos. M. Sanders, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General Leslie C. Garnett, J. D. Logan, R. T. Hubbard, and Kime & Kime, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The question in this case is whether or not the intangible property of the estate of Thomas H. Cooper, deceased, is liable to taxation by the Commonwealth of Virginia, the county of Roanoke, school district No. 5 of Roanoke county, and the town of Salem, and depends upon whether his domicil for several years before his death was at Salem, Roanoke county, Virginia, or at Cooper's, Mercer county, West Virginia. The assessments having been made in 1915 for the years 1908 to 1915 inclusive, C. L. Hatcher, sheriff of Roanoke county and as such administrator of the decedent, alleging that such assessments are erroneous, applied under sections 567 and 571 of the Code for their correction and cancellation.

By consent and for convenience the motions were heard together and a single judgment entered. The trial court being of the opinion that Cooper was, within the meaning of the tax laws, a resident of Virginia from 1905 until his death, held the appellant liable for all the taxes assessed in favor of the Commonwealth, and pursuant to the statute

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(Acts, 1916, p. 827, construed in *Commonwealth v. United Cigarette Machine Co.*, 120 Va. 835, 92 S. E. 901), relieved him from all local taxes prior to the year 1912, but held him liable for such local taxes for the years 1912 to 1915, inclusive.

The facts are, that Thomas H. Cooper, who had been domiciled in West Virginia since his childhood, in 1904 brought his wife and children to the town of Salem. He there bought twelve acres of land and erected a valuable dwelling thereon, the cost of which was variously estimated, but which was assessed for taxation in 1915 at \$32,000, and its market value is estimated to be between \$50,000 and \$60,000. He with his family occupied this dwelling from its completion until March, 1911, when he died. When he first went to Salem and on every other occasion when the matter was referred to, he averred that his residence there was only temporary; that he came for the purpose of educating his children; and that he proposed to retain his domicile and citizenship in the State of West Virginia and to return to his home there when his purpose was accomplished. During all of this period he paid his poll tax annually in West Virginia, and voted regularly at Cooper's in that State. At the time he came to Virginia and to the end of 1909, as certified in the bill of exceptions, he was postmaster at Coaldale, a mining village two or three miles from Cooper's, and he was his father's administrator in West Virginia. He was the general manager of the McDowell Coal and Coke Co., and of the Coaldale Coal and Coke Co., and president of the Mill Creek Coal and Coke Co. He was a director of the Bank of Bramwell, W. Va., and of the Fidelity Bank and Trust Co. of Bluefield, W. Va., all of which positions he held up to the date of his death. As an officer of the coal companies above mentioned, he actively managed their business, which was large, received a salary therefor, and his habit was to go to West Virginia

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and remain two or three days, every ten days or two weeks, for the purpose of attending to his business there. He reserved a room, which he called his own, in a house on the property of one of these companies at Cooper's, which was occupied by his mother. A very large part of his estate was invested in the stock of these coal mining companies. When he first came to Virginia the commissioner of the revenue at Salem proposed to assess him for capitation tax and demanded that he list his intangible property for taxation, for he was known to be well to do, but he denied his liability therefor, claiming that he was not domiciled in the State of Virginia, did not propose to change his domicile from West Virginia, and stated that he was postmaster at Coaldale and required by the Federal government to maintain a residence there; and, therefore, he only listed his tangible personal property in Salem for taxation. Each year thereafter when the tax interrogatories were presented to him, he erased all those portions thereof which would indicate that he was domiciled in Virginia, and always refused to list or pay any capitation or intangible property tax in Virginia, but he annually listed and paid taxes on his household furniture and other tangible property in Salem. Shortly after his death, his widow, on March 29, 1911, by a writing filed in the county clerk's office of Mercer county, W. Va., waived her right to qualify there as administratrix of her husband's estate, requested that his brother, Edward Cooper, be appointed his administrator, and upon her motion he was appointed. Edward Cooper took immediate charge of all of his estate, some of the securities being in a safe deposit vault in Salem, and some in a West Virginia bank, and has proceeded to administer his estate under that appointment. Four years thereafter, in 1915, by an order of the Circuit Court of Roanoke county, Virginia, Cooper's estate was committed to C. L. Hatcher, sheriff of Roanoke county, the appellant.

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here, and thereafter in 1915 the assessments complained of, \$180,000 of intangible property and \$25,000 income, for the years 1908 to 1915, inclusive, were made. The Virginia administrator testified that no property has come into his hands as such administrator, and that he knows of none within the State of Virginia which will come into his possession to be administered.

To justify the assessments these facts are relied on: That the decedent, Cooper, was a student at Roanoke College, Salem, Virginia, and married a resident of that town. Of the marriage six children were born, five while they were in West Virginia, and one after their return to Salem. He did not own any residence in West Virginia, but while there occupied one owned by one of the coal companies with which he was connected. When he came to Salem, he brought his household furniture with him. While there he became a stockholder in the Farmers' National Bank of Salem, a stockholder and officer in the Colonial Bank of Roanoke, a stockholder, director and president of the Catawba Valley Railway and Mining Co., extending about six miles from Salem, stockholder and official of the Cooper Silica and Glass Co., Inc., and of the Consumers Fuel Co., Inc., the last four being Virginia corporations. While in Salem he signed three certificates for the purpose of procuring three separate charters in the State of Virginia, in each of which his place of residence was stated to be Salem, Va. In 1909 he procured two life insurance policies, and in each of his applications therefor answered questions stating that Salem, Va., was his residence and business address. Upon application to the Secretary of the Commonwealth of Virginia for his automobile licenses in 1907 and 1910 his residence and postoffice address were said to be Salem, Va. He became president of the board of trade of Salem. He transferred his church membership to the Methodist Episcopal Church, South, at Salem, was on the

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board of stewards of this congregation, and was the chief contributor of the necessary money for its new church building. His children went to the public schools of Salem without the payment of fees, which are required of non-residents, though there is no suggestion that he ever refused to pay such fees, or that he was ever asked to do so. When not on social or business trips to West Virginia or elsewhere, he spent his time in Salem. He purchased two burial lots in East Hill Cemetery, Salem, and removed the bodies of two of his dead children and interred them in those lots.

Though frequently so used, "residence" and "domicil" are not synonymous words and *domicil* has the larger significance. The meaning of the word *residence* depends upon the subject matter and connection in which it is used. In general terms it may be said to be the dwelling place of a person, but it may be either his permanent or temporary abode. In the construction of statutes, the meaning of the word *residence* depends upon the context and purpose of the statute. As used in one statute it may clearly refer to a mere business residence, while as used in another it may just as clearly refer to *domicil* as technically and strictly defined. In determining the meaning of the word in a particular statute, the legislative purpose and the context must always be kept in view. *Raymond v. Leishman*, 243 Pa. St. 64, 89 Atl. 791, L. R. A. 1915 A, 400, Ann. Cas. 1915 C. 783.

As used in the Virginia statutes (Code, secs. 491 and 494, as amended, Acts 1915, 219), so far as they relate to taxes upon intangible property, having no other situs for taxation, the words "residing therein" and the words "residing * * * in his district" can only refer to persons domiciled in the district of the local commissioner of the revenue who makes the assessment, for any other construction would inevitably lead to hopeless confusion and conflict between the different communities in this and in other States,

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in which the taxpayer might have temporary residences, as well as to multiplied taxation upon the same property. *Pendleton v. Commonwealth*, 110 Va. 232, 65 S. E. 536.

The distinctions between domicil and residence have been frequently defined, but the difficulties of applying these distinctions to the facts of particular cases are very great indeed.

No better statement of the law and of these difficulties has been made than that of Chief Justice Shaw, in the case of *Thorndike v. Boston*, 1 Metc. (Mass.) 245, which is quoted with approval by Judge Cooley (Cooley on Taxation, 641): "The questions of residence, inhabitancy or domicil—for although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicil in one place would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place."

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In *Bruner v. Bunting*, 15 Va. Law Reg. 516, Kelly, Judge, in a contested election case, summarizes the authorities thus:

"In the case of *Long v. Ryan*, 30 Gratt. (71 Va.) 718, Judge Staples, in delivering the opinion of the Supreme Court of Appeals of Virginia, shows that "residence" within the meaning of the suffrage laws is clearly distinguishable from the same word as used in its popular sense to denote merely the act of abiding or dwelling in a given place. Both the word "residence" and the word 'domicil' have been the occasion of more or less confusion by reason of the different meanings which they are used to convey in different connections. It may be safely said, however, that as used in the Virginia election laws, 'residence' is substantially synonymous with 'domicil' as the latter word is defined in the opinion of Judge Staples in *Long v. Ryan*, *supra*. He says:

"There is, however, a wide distinction between domicil and residence, recognized by the most approved authorities everywhere. Domicil is defined to be residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time. To constitute domicil two things must concur—first, *residence*; secondly, the intention to remain there. *Pilson, Trustee, v. Bushong*, 29 Gratt. (70 Va.) 229; *Mitchell v. United States*, 21 Wall. (U. S.) 350, 22 L. Ed. 584. Domicil, therefore, means more than residence. A man may be a resident of a particular locality without having his domicil there. He can have but one domicil at one and the same time, at least for the same purpose, although he may have several residences."

"In *Lindsay v. Murphy*, 76 Va. 428, Judge Burks, quoting with approval from a previous opinion of our Supreme Court written by him, said:

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“Residence, with no present intention of removal, constitutes domicil. Mere change of place is not change of domicil. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. To constitute a new domicil two things must concur—first, residence in the new locality; second, the intention to remain there. Until the new domicil is acquired, the old one remains and whenever a change of domicil is alleged, the burden rests upon the party alleging it. These principles are said to be axiomatic.’

“In a comprehensive note to *Berry v. Wilcox*, 48 Am. St. Rep. 711, the annotator shows by a strong array of authorities too numerous to be repeated here, that every person must for all purposes have a legal residence or domicil somewhere; that he can have but one; that a domicil once acquired continues to exist until another is acquired elsewhere; that to effect a change of domicil there must be an actual abandonment of the former one coupled with an intent not to return to it, and also a new domicil acquired at another place, which can only be done by the union of intent and personal presence; that mere change of dwelling place, however long continued, does not of itself constitute change of domicil; and that the burden of proving the abandonment of the old and the acquirement of the new is upon the party making the charge. (See also to the same general effect *Pendleton v. Commonwealth*, 110 Va. 229, decided at Staunton, September 16, 1909, 65 S. E. 536).

“Mr. Raleigh Minor, in his work on Conflict of Laws, at page 114 (sec. 59), says:

“‘It must be observed that neither presence alone, nor intention alone will suffice to create a domicil of choice. Both must concur, and at the very moment they do concur the domicil is created. As it is sometimes expressed the *factum* (presence) and the *animus* (intention) must unite.

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And thereafter no changes of locality alone (there being no change of intent), or, *vice versa*, no change of intention (there being no change of locality) will effect an alteration of the domicil of choice, which remains where it was, until the *factum* and the *animus* again unite.'

"It is also settled law that where the intention of the party is in doubt, the fact of his returning regularly to vote, and the fact of his continuing to serve on juries at the place of former domicil, are among the best evidences that there has been no abandonment of the old, and no purpose to acquire a new one—*Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 584; 14 Cyc. 862-3; Minor on Conflict of Laws, sec. 64; *Murry v. McCarty*, 2 Munf. (16 Va.) 393; *Shelton v. Tiffin*, 6 How. (U. S.) 184, 12 L. Ed. 387."

In 9 R. C. L. 538, this is stated: "It is a fundamental rule that every man is deemed to have a domicil somewhere, that he can have but one, and that until another is acquired elsewhere he retains his domicil of origin. Consequently one domicil cannot be lost until a new one is acquired, and conversely the acquisition of a new domicil *ipso facto* terminates the old."

The most recent and comprehensive collection and review of the authorities is found in a note to *The King v. Board of Assessors* (41 New Bruns. 564), Ann. Cas. 1917 B, 727.

The debatable question here then is one of fact, to be determined from the evidence.

If the facts relied upon by the appellees stood alone, they would be unquestionably sufficient to justify the inference that Cooper was domiciled at Salem, Va., and hence that his estate is liable to taxation there upon his intangible property, while, on the other hand, if there were no other facts than those relied upon by the appellant to show that Cooper never relinquished his domicil at Cooper's, W. Va.,

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they would be sufficient to justify the conclusion that Cooper had not changed that domicil, and hence that his estate is not so liable.

It being established that from his childhood and prior to 1905 Cooper's domicil was in West Virginia, the burden is upon those who allege such change of domicil to establish it. The evidence shows that upon every occasion upon which the subject was discussed, Cooper plainly made his purpose evident, namely, that he did not propose to give up his legal domicil in West Virginia, and he also indicated his reasons for that purpose to be, that his chief business was there, his largest property interests were there, that he was postmaster there and apparently desired to continue to hold the office, which he felt that he could not do if he changed his domicil; and in 1905, when asked to list his intangible property, he refused to do so and distinctly tendered the issue of fact which is involved to the commissioner of the revenue. That issue was tendered each year thereafter to the public authorities when he filled out and returned his tax interrogatories, having first erased all that part of the blank which indicated that he was a citizen domiciled in Virginia and hence liable to taxation upon his intangible property as well as to the capitation tax.

In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicil, and must be generally, if not universally, supported by the oath of the voter. Its unlawful exercise subjects him to prosecution both for illegal voting and for perjury if he swears falsely, and such act is a distinct, unequivocal and public assertion by the voter of his legal domicil. It clearly appears that Cooper, by every means in his power except that he built a house for his family in Salem in which he lived

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with them, and that he became interested in the local enterprise of the community, evidenced his purpose to maintain his citizenship in West Virginia.

It is imperative that these established distinctions between domicil and residence be maintained so that the political and property rights of individuals may be preserved, and that the right of each community to levy taxes upon the intangible property of its domiciled citizens may be unquestioned.

The residence of the President is in the White House at Washington, while the domicil of the incumbent is in New Jersey; the residence of ambassadors during their terms must be at the capitals of the foreign countries to which they are accredited, while their domicils remain in the territory of their own governments; many other public officials, voluntarily or because required by law to do so, change their residences during their terms but retain their original domicils, in which they continue to exercise their political rights during their terms and to which they return at the expiration thereof; and many other persons, either for pleasure, health or business reasons, have and maintain several residences while they retain and can retain but one domicil. As to all of these classes of persons, and those included therein are numerous, their domicils determine their right to vote as well as the *situs* for taxation of their intangible property.

It is argued by counsel in this case with very great force, that Cooper could not do the inconsistent things which he has done and yet retain his domicil in West Virginia. It is, however, not difficult to suggest reasonable explanations of these apparent inconsistencies. While the value of his dwelling built in Salem certainly indicates an intention to reside there permanently, it is not conclusive of the question, and his statement that he intended it only as a home for his family until his children were educated,

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though it may be fairly questioned, is not incredible. The removal of his church membership to Salem was perfectly natural because he expected to be there for many years. His purchase of the burial lots there was also natural and of little probative value, because many sentimental reasons influence the selection of burial places for our dead, having little reference to legal domicile—among many others, the beauty of the cemetery and the ease with which the lots may be cared for in the future—and the selection in this case might have been because Salem was, before her marriage, the home of Mrs. Cooper. The responsibility for his becoming president of the Salem board of trade must rest upon the membership of that body, and should doubtless be construed to be a compliment paid to him as a man of “probity and integrity” (the character which is conceded to him in the evidence) and in recognition of the fact that he was generous, public-spirited, had contributed largely to the religious efforts of the community, and had invested most liberally in its business enterprises. Knowing that he still claimed his legal domicile in West Virginia, possibly they wished him to change his purpose and to identify himself still more completely with the community which was profiting by his residence there. His signature to documents which stated that he was a resident of Salem would be convincing and conclusive in most cases, but loses much of its force in this case because of his contemporaneous declarations that he was a domiciled citizen of Cooper’s, West Virginia, together with the probability, as indicated by his acts and statements, that he was advised of the legal distinction between domicile and residence and that he used the word resident in its restricted sense. That he failed to pay for sending his children to the Salem public schools may be explained by the fact that he was never asked to pay therefor, and it is probable that he was not asked to do so because he directly contributed to their maintenance

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as a large taxpayer on his real and tangible personal property located there, and indirectly did so through his considerable investments in the stock of local corporations which were taxable there.

While the failure of the local authorities in Virginia to contest the issue made by Cooper as to his legal domicile during his lifetime does not preclude the Commonwealth and the other appellees from now asserting their claims, at the same time the fact that the issue then tendered by him was not contested in his lifetime is a circumstance which should be considered in weighing the testimony and in determining the *bona fide* character of his acts and declarations. It is also worthy of comment that his view of the question was not contested until four years after his death. If he were living he would certainly be the most material witness to sustain his contention and much would depend upon the character of his testimony and his explanation of, or failure to explain, his apparent inconsistencies.

From a careful consideration of the evidence, we have reached the conclusion that the circuit court erred in deciding that Cooper's intangible property is liable to taxation in Virginia, and the determination of this question makes it unnecessary to consider several other interesting questions which the record discloses.

The judgment will be reversed, the appellant exonerated from the payment of the taxes erroneously assessed against him, and the case remanded to the Circuit Court of Roanoke county, with directions to enter such further orders, if any, as may be necessary, in accordance with the views herein expressed.

Judgment reversed.

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DICKENS AND OTHERS V. RADFORD-WILLIS SOUTHERN RAIL-
WAY COMPANY.

September 20, 1917.

1. **STATUTES—Title—Constitutional Law—Construction of Section 52 of the Constitution.**—The purpose of section 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title, was to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the titles gave no intimation. On the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable.
2. **STATUTES—Title—Constitutional Law—Section 1103-a, Code of 1904.**—Code of 1904, section 1103-a, entitled: "Procedure by which unpaid subscriptions to joint stock companies may be recovered by said companies, their creditors, receivers, trustees, assignees, or any other person," is not unconstitutional, because the act deprives courts of equity of jurisdiction to determine the validity of such subscriptions, without making mention of such purpose in the title. The fact that a new procedure was to be provided by the act for the recovery of unpaid subscriptions necessarily implied that a change in existing

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remedies was intended. It would be impracticable to embrace in the title to such an act the various remedies, offensive and defensive, affecting subscriptions to stock.

8. STOCK AND STOCKHOLDERS—*Unpaid Subscriptions—Procedure—Section 1103-a of the Code.*—Section 1103-a, Code of 1904, prescribing the procedure by which unpaid subscriptions to joint stock companies may be recovered by the companies, their creditors, etc., applies exclusively to suits or motions by the company and creditors (or subordinate claimants under the company) to recover unpaid subscriptions to the stock. In such proceeding, therefore, the stockholder must necessarily occupy the position of defendant; but the statute imposes no limitation upon the right of a stockholder who chooses to take the initiative (before suit or motion under section 1103-a has been instituted) to resort to any appropriate remedy for relief from liability on his subscription. If, however, he delays action until after suit or motion has been brought against him to recover his unpaid subscription, he cannot then by resort to equity, or otherwise, oust the exclusive jurisdiction acquired by the common law court under the statute. Nevertheless, the statute affords the stockholder an adequate and complete remedy, and clothes the common law court with exclusive jurisdiction to hear and determine all questions involving the validity of such subscription. This construction of section 1103-a, Code of 1904, leaves unimpaired the right of a stockholder proceeded against under that statute to avail of all defenses afforded by section 3299; yet, by implication, it qualifies section 3300 to the extent of denying to such stockholder, who has not filed a special plea of set-off, power to defeat the exclusive jurisdiction of the common law court by going into equity under that section.
4. STOCK AND STOCKHOLDERS—*Procedure to Collect Unpaid Subscriptions—Section 1103-a of the Code.*—On the trial of a motion under section 1103-a of the Code, to recover unpaid subscriptions to joint stock companies, the court on appropriate pleas, or statement in writing of grounds of defense, should submit to the jury all issues of fact involving the validity of the subscription, or other matter constituting a defense to a recovery, in order that a complete determination of the controversy may be made.

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Appeal from a decree of the Corporation Court of the city of Radford. Decree for defendant. Complainants appeal.

Affirmed.

The opinion states the case.

Harless & Colhoun and *H. C. Tyler*, for the appellants.

Jordan & Roop and *W. W. Goldsmith*, for the appellee.

WHITTLE, P., delivered the opinion of the court.

Appellee, the Radford-Willis Southern Railway Company, pursuant to section 1103-a of the Code, was proceeding by separate motions on the common law side of the Corporation Court of the city of Radford to recover from Dickens and other stockholders the amount of their respective subscriptions to the capital stock of the company, when appellants obtained a temporary injunction restraining the company from the prosecution of the motions at law. The bill likewise contained the prayer for cancellation and rescission of the contracts of subscription for shares of stock on the ground that they were procured by the false and fraudulent representations of the company and its officers and agents. From a decree dismissing the bill on demurrer this appeal was granted.

The statute (now section 1103-a of the Code) first appeared in the Acts of 1895-6, p. 25, and was amended, Acts 1897-8, p. 16. It is matter of local history that this legislation was the product of the "boom" of 1890, which swept over the State at that period leaving financial ruin in its trail. The legislation was distinctly intended as a relief measure to subscribers to stock in these boom corporations, which sprang up in almost every section of the State.

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We shall first consider the objection raised to the constitutionality of section 1103-a on the ground of alleged insufficiency of the title under section 52 of the Constitution.

The title reads: "Procedure by which unpaid subscriptions to joint stock companies may be recovered by said companies, their creditors, receivers, trustees, assignees, or any other person." And the act is as follows:

"All suits or motions for the recovery of unpaid subscriptions to the stock of any joint stock company shall be brought in the courts of common law of this commonwealth in the county or corporation where the defendant resides, if he be a resident of this State, or in the case of a joint or partnership subscription then in the county or corporation in this State in which either of the joint subscribers or any member of the partnership subscribing shall reside; and said courts shall have exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions, but nothing herein contained shall be construed to deprive courts of chancery of their jurisdiction to settle and wind up the affairs of insolvent corporations or to make assessments on unpaid stock subscriptions.

"In all cases where it is necessary to resort to a court of equity for the purposes aforesaid the courts shall direct the trustee, assignee, or receiver, as the case may be, to sue at law when necessary to recover any call or assessment, and the defendant shall be entitled to a jury where the amount involved exceeds twenty dollars, and said suits shall be governed in all respects by the provisions of this act. All pleas, defenses, and evidence which would be admissible if the company were solvent shall be equally admissible and shall have the same effect in law in any action brought after the insolvency of any such company, except where the defense relied upon is an agreement on the part of the corporation not to assess the face value of the stock subscribed and such agreement was unknown to the creditor

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at the date of his contract; and this act shall apply to all suits heretofore or hereafter brought where no final judgment or decree on the merits has been rendered: provided, that where chancery suits are pending at the time of the passage of this act, in which it is sought to recover unpaid stock subscriptions, the statute of limitations shall not run as to any alleged subscription during the time which shall have elapsed between the institution of such suit and one month after an order shall have been entered authorizing a common law action as provided in this act for the recovery of such subscription."

The objection, if we apprehend it, is not that the title does not sufficiently express the main object of the act, which is to prescribe the procedure by which the company, and other designated parties, may recover unpaid subscriptions to joint stock companies, but that the act deprives courts of equity of jurisdiction to determine the validity of such subscriptions, without making mention of such purpose in the title. This we conceive to be a misconception both of the title of the act and the design of section 52 of the Constitution.

Commonwealth v. Iverson Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, is the leading case on the subject, Riely, Judge, in delivering the opinion of the court, discussing this provision at page 771 of 91 Va., at page 360 of 21 S. E. (28 L. R. A. 110), observes: "The provision of the Constitution is a wise and wholesome one. Its purpose is apparent. It was to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other, and to prevent surprise or fraud in legislation by means of provisions in bills

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of which the titles gave no intimation. And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable."

This lucid exposition of the subject by Judge Riely is sustained by the highest authorities and has been uniformly followed by subsequent decisions of this court. It leaves nothing to be said in defense of the title to section 1103-a. The fact that a new procedure was to be provided by the act for the recovery of unpaid subscriptions necessarily implied that a change in existing remedies was intended. And, besides, it would be impracticable to embrace in the title to such an act the various remedies, offensive and defensive, affecting subscriptions to stock. Yet, the omission of any one of them, according to the contention of appellants, would render the act unconstitutional. Such a construction of this wise provision can hardly be expected to meet with favorable consideration.

Some confusion of thought seems to have arisen with respect to the scope of the remedy provided by section 1103-a. It applies exclusively to suits or motions by the company and creditors (or subordinate claimants under the company) to recover unpaid subscriptions to the stock. In such proceeding, therefore, the stockholder must necessarily occupy the position of defendant; but the statute imposes no limitation upon the right of a stockholder who chooses to take the initiative (before suit or motion under section

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1103-a has been instituted) to resort to any appropriate remedy for relief from liability on his subscription. If, however, he delays action until after suit or motion has been brought against him to recover his unpaid subscription, he cannot then by resort to equity, or otherwise, oust the exclusive jurisdiction acquired by the common law court under the statute. Nevertheless, the statute affords the stockholder an adequate and complete remedy, and clothes the common law court with exclusive jurisdiction to hear and determine all questions involving the validity of such subscription.

The defendant is entitled to a trial by jury; and in Burks' Pleading and Practice, sec. 100, p. 174, it is said: "Defense may be made either by formal pleas, or by an informal statement in writing of the grounds of defense. In these proceedings by motion it is intended that, in so far as possible, all formalities and technicalities shall be done away with. And this policy extends to the modes of making defense, as well as to the notice of the motion. Accordingly, it is held that no *formal* pleas are *necessary*, except in cases where statutes require them, but that the defendant may make his defense by an informal statement in writing of the grounds of his defense. This statement will be treated as a plea or pleas, and the plaintiff may reply thereto with like informality. The defendant, however, *may* plead formally if he chooses, according to the course of the common law, and this is in all cases the *better practice*. But in every case an *issue* must in some way be made up on the record, in order to have a trial by jury." *Supervisors v. Dunn*, 27 Gratt. (68 Va.) 608; *Preston v. Salem Improvement Co.*, 91 Va. 583, 22 S. E. 486; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1101.

The construction that we have placed upon section 1103-a leaves unimpaired the right of a stockholder proceeded against under that statute to avail of all defenses afforded

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by section 3299; yet, by implication it qualifies section 3300 to the extent of denying to such stockholder, who has not filed a special plea of set-off, power to defeat the exclusive jurisdiction of the common law court by going into equity under that section. Section 3300 does not invest a litigant with additional remedies in equity, but limits his right to such resort to equity as he would have been entitled to if section 3299 had not been enacted; and he would have possessed no such right under section 3300, after a proceeding at law had been instituted against him by the company, or those claiming under it, in accordance with the provisions of section 1103-a, for the recovery of the amount due on his stock subscription. It is true that section 3299 does not give the common law court jurisdiction to cancel or rescind the contract for fraud, the scope of the section only being to grant relief by way of equitable set-off. It is also true that in the state of the law prior to the enactment of section 1103-a, common law courts were without jurisdiction to afford adequate and complete relief in the case before us. But, as we have seen, it was the purpose of the legislature, by that enactment, to revise the law in that respect and to confer upon common law courts "exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions." It would be difficult to conceive how a more adequate and complete remedy could be devised than to invest a court in a given procedure with exclusive jurisdiction to hear and *determine all questions involved*.

On the trial of such motion, the court on appropriate pleas, or statement in writing of grounds of defense, should submit to the jury all issues of fact involving the validity of the subscription, or other matter constituting a defense to a recovery, in order that a complete determination of the controversy may be made.

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We are of opinion that the decree of the corporation court sustaining the demurrer and dismissing appellants' bill for want of jurisdiction was plainly right and should be affirmed.

Affirmed.

SIMS, J., dissenting:

If the statute, section 1103-a, Pollard's Code of Va., 1904, has not taken it away, courts of equity have jurisdiction to entertain a bill such as that of the appellants in the case before us, to cancel a stock subscription obtained, as alleged, by fraudulent misrepresentations. Section 3300, Pollard's Code of Va., 1904; *Rohrer v. Strickland*, 116 Va. 755, 82 S. E. 711; *Burks' Pl. & Pr.* 454; 1 *Whitehurst Eq. Pr.*, sec. 296, p. 510; *Selden v. Williams*, 108 Va. 542, 62 S. E. 380; 3 *Elliott on Contracts*, sec. 2428; 9 *Corpus Juris*, p. 1174; *Manning v. Berdan* (C. C.), 135 Fed. 161; *Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734; *Dotson v. Kirk*, 180 Fed. 15, 103 C. C. A. 368; 16 Va. Law Reg. 520; *Kilbourne v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Bosher v. Richmond, etc., Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; *Oglesby Co. v. Ould Co.*, 117 Va. 546, 85 S. E. 475; *Richlands Oil Co. v. Morris*, 108 Va. 288, 61 S. E. 762; *Jordan v. Annex Corp.*, 109 Va. 625, 64 S. E. 1050, 17 Ann. Cas. 267. This is conceded by the majority opinion.

To the well settled rule that "Courts of equity having once acquired jurisdiction never lose it because jurisdiction of the same matters is given to courts of law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words" (8 *Ency. Dig. Va. & W. Va. Rep.*, p. 869), there is a necessary corollary, namely, that where such a statute uses prohibitory or restrictive words, the equity jurisdiction is not taken away beyond the requirement of such words.

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With respect to the statute, sec. 1103-a, referred to, the following may be observed:

The statute, as appears on the face of it, was enacted to limit and confine the remedy for the enforcement of stock subscription contracts to courts of law, in suits or motions to recover such unpaid subscriptions. It was enacted for the benefit of the subscribers to stock and not in any way to limit or confine their remedy for relief from liability on stock subscription contracts when such remedy theretofore existed. As was held by this court in *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751, of said statute, "All that was intended to be accomplished by the statute, was to deprive courts of equity of * * * concurrent jurisdiction with courts of law in the enforcement of the legal rights, and to restrict the bringing of actions *upon the contract of subscription* to the law court. *Apart from this purpose of the act, it leaves courts of chancery with their jurisdiction unimpaired.* *Reed v. Gold*, 102 Va. 37, 45 S. E. 858 [868]." (Italics supplied).

The statute in question, therefore, is not applicable to and does not in any way affect the right of a stock subscriber to institute and maintain a bill in equity for relief from a stock subscription contract. It is concurrent with his right given by section 1103-a to insist that a suit *against* him to enforce the stock subscription contract by the company or other person named in such statute be instituted *by them* only in a common law court. That is to say (as indeed clearly appears from the language of said statute, section 1103-a, itself) such statute provides with respect to "all suits or motions for the recovery of unpaid subscriptions to the stock of any joint stock company," *initiated* by the persons named in the statute, that they shall "be brought in the courts of common law of this Commonwealth * * *" And the provision in such statute that the courts of common law "shall have exclusive juris-

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diction to hear and determine all questions *involving the validity of such subscriptions.*" (Italics supplied), must be read and interpreted in the light of the sole object of the statute aforesaid, namely, "to deprive courts of equity of * * * concurrent jurisdiction with courts of law in the *enforcement of the legal rights*" (of the persons named in the statute, *against the stock subscriber*) "upon the contract of subscription * * *" The language, "all questions involving the validity of such subscriptions" used in such statute, can, therefore, refer only to questions *arising in suits "brought" or initiated by such persons* against the stock subscriber to enforce such subscription contracts, which in turn are necessarily confined to questions of *defense* of the stock subscriber interposed to the enforcement against him of such contracts. The statute gives the stock subscriber *no right to any affirmative relief* against the company, to obtain a cancellation of the contract. It did not need to do so, since he had that remedy in equity. The statute added to this remedy in equity the right in the stock subscriber to require any proceeding *against* him to be by a suit or motion in the courts of common law. Finding such right given by statute to fall short of giving him the relief which his remedy for cancellation of the contract, existing in equity as aforesaid, would give him, the stock subscriber, in the case before us, by bringing his suit in equity, as he did, waived his right to require the plaintiff in such action to enforce the alleged contract only in a court of law, and would not be heard to complain if the court of equity should enforce such contract in the equity suit in the event he should fail to prove the fraudulent representations he alleges. The statute, section 1103-a, having reference only to suits *initiated by those seeking to enforce* stock subscription contracts and not to suits in equity *initiated by the stock subscriber*, cannot be construed to take away or limit the jurisdiction of a court of

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equity in suits initiated by the stock subscriber invoking the ancient and well settled jurisdiction of equity to cancel such a contract as aforesaid. Such jurisdiction, existing as aforesaid, once taken at the instance of the stock subscriber, extends to the going on of the court to give complete relief to all parties, even to the extent of enforcing the stock subscription contract against the plaintiff, if such relief is sought by the defendant therein by appropriate pleading in accordance with the practice established in equity.

The majority opinion does not touch upon what is said in the next preceding paragraph, but it is in accord with the residue of what is said above, if the stock subscriber should institute a suit in equity to cancel the stock subscription contract *before* suit or motion under section 1103-a aforesaid, holding that in such case the last-named statute has no application. The majority opinion adds, however, that if the stock subscriber delays action until after suit or motion has been brought against him to recover his unpaid subscription, "he cannot then resort to equity, or otherwise oust the exclusive jurisdiction acquired by the common law court under the statute. Nevertheless, the statute affords the stockholder an adequate and complete remedy. * * *" I cannot concur in these conclusions.

With respect to the former conclusion: I do not perceive anything in the statute in question making it any more applicable to such a suit as aforesaid by a stock subscriber *after* than *before* suit or motion under it has been instituted to enforce the stock subscription contract. I think the true distinction is that such statute has no application at any time to a suit in equity as aforesaid by a stock subscriber; and that after suit or motion under such statute has been instituted to enforce the stock subscription contract, the stock subscriber still has his remedy

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aforesaid in equity unimpaired, unless he is cut off therefrom by section 3300, Pollard's Code, 1904, by reason of his having tendered in the common law proceeding a plea which had not been there rejected, raising therein the same issue of fact which he would have to rely on in the equity suit, and issue in fact being joined in the common law proceeding on such plea and such issue being there found against him.

Said section 3300, so far as applicable, is as follows: "If a defendant, entitled to such plea as is mentioned in the preceding section, shall not tender it, or though he tender it, if it be rejected for not being offered in due time, he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted. If, when an issue in fact is joined thereon, such issue be found against the defendant, he shall be barred of relief in equity upon the matters alleged in the plea, unless upon such ground as would entitle a party to relief against a judgment in other cases. * * *"

It is the raising by the stock subscriber of such issue in the common law proceeding and the decision of such issue against him there which alone can deprive him of his remedy in equity aforesaid; not the institution of the suit or motion against him under section 1103-a aforesaid.

Nor can I concur in the conclusion that the statute, section 1103-a, affords the stock subscriber "an adequate and complete remedy." It affords him no remedy to cancel the stock subscription contract. It, as aforesaid, does not even purport to give the stock subscriber any affirmative relief. It does not authorize the common law court to cancel the contract. Without statutory authority such court is powerless to grant such relief. This being true, it seems clear to me that such statute does not afford an adequate and complete remedy to the stock subscriber.

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For the foregoing reasons I am of opinion that the decree complained of is erroneous and should be reversed, and I am, therefore, constrained to dissent from the majority opinion of the court.

Affirmed.

Syllabus.

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FLEENOR v. HENSLEY.

September 20, 1917.

1. TRUSTS AND TRUSTEES—*Parol*—An express trust in real estate may be created by parol, but the declaration must be unequivocal and explicit and established by clear and convincing testimony.
2. TRUSTS AND TRUSTEES—*Parol Trust—Consideration*.—On principle, it is immaterial from whom the consideration is derived to support an express trust. In this particular an express trust created by parol, cannot differ from such a trust created by writing. The consideration may move from any donor of it for the benefit of a *cestui que trust* other than the donor. It need not move from the *cestui que trust*, and usually does not. All persons who have the capacity to hold and dispose of property can impress a trust upon it. If a trust has been completely declared, the absence of a valuable consideration (moving from the *cestui que trust*) is entirely immaterial.
3. TRUSTS AND TRUSTEES—*Express Trust*.—A voluntary trust is an equitable gift *inter vivos*, and needs no consideration moving from the *cestui que trust* to support it. And it is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it.
4. TRUSTS AND TRUSTEES—*Fraud—Enforcement in Equity*.—A court of equity will not enforce a trust created for an illegal or fraudulent purpose.
5. TRUSTS AND TRUSTEES—*Enforcement of Trust—Fraud—Issue Not Made by the Pleadings*.—In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant.
Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant.

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6. **EQUITY—Pleadings.**—A court of equity can decree only upon the case made by the pleadings. This is especially true where fraud is relied on as established by the proof. It must be distinctly alleged in the pleadings, otherwise it cannot be the basis of any decree.
7. **TRUSTS AND TRUSTEES—Enforcement.**—In a suit in equity to enforce an express trust created by parol agreement in a certain tract of land, it appeared from the evidence that defendant accepted the trust for complainant and another; that complainant's interest at that time was not undivided, but a specific part of the land set apart to her by partition; that this was known to defendant at the time he accepted the trust; that such specific portion of land belonging to complainant was reduced by the sale and conveyance, to the specific parcel of land claimed by her in her bill.

Held: That complainant was entitled to a decree against defendant for a conveyance of such specific parcel of land, and not, as contended by defendant, to an undivided interest in the land.

Appeal from a decree of the Circuit Court of Scott county. Decree for complainant. Defendant appeals.

Affirmed.

STATEMENT OF THE CASE AND FACTS.

This is a suit in equity by the appellee, Eliza Hensley, to enforce against the appellant an express trust, created by parol agreement, in a certain tract of land described in the bill by definite metes and bounds, said to contain about 75 acres.

The evidence is conflicting, but the preponderance of proof establishes the following facts:

The legal title to said land, along with other land, together aggregating some 400 acres, was at one time vested in one W. H. Hensley, a son of said appellee. By deed dated and duly recorded March 10, 1888, W. H. Hensley conveyed all of such 400 acres of land to his wife, Martha E. Hensley. Creditors of W. H. Hensley, whose debt was

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contracted prior to the execution of the last named deed, instituted suit to subject such land to the payment of such debt, alleging that said deed was made by Hensley to his wife "without valuable consideration and wholly voluntary on his part and for the purpose of hindering, delaying and defrauding creditors." In that suit an account of liens was taken; the whole of the 400 acres of land was held liable to be subjected for the payment of the debt of the plaintiffs in such suit and for the payment of certain other unpaid purchase money and deed of trust debts of said W. H. Hensley. Accordingly this land was sold in such suit, by a commissioner of court, on the terms of cash enough to pay costs and expenses of suit and sale and the residue on a credit of six and twelve months, with interest, the purchaser to give bond and good security therefor. At this sale the appellant became the purchaser at the price of \$1,025.00 in gross and not by the acre.

The testimony for said appellee is clear and convincing that the appellant made such purchase under an unequivocal and explicit declaration by him that he did so "for Liz" (said appellee) "and Marth" (said Martha E. Hensley): that prior to the purchase, appellant agreed that he would convey such land to the two last named parties as soon as they had paid the purchase money in full; and that E. H. Hensley, the husband of said appellee, and said W. H. Hensley on the day of sale, procured appellant to bid in the land for Eliza and Martha Hensley and that the latter had previously authorized them to do so. That W. H. Hensley was the chief actor in the transaction in behalf of his wife and mother. That no part of the purchase money was paid by appellant. That the cash payment of \$196.00 or \$197.00 was made for Eliza and Martha Hensley by W. H. Hensley and E. H. Hensley, the former furnishing the greater part of it. That they procured the sureties who united with appellant in the bonds for the deferred pay-

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ments of purchase money. That the residue of the purchase money was paid from the sale of a portion of the 400 acres of land to one Burdine after both of the said purchase money bonds were past due. That the sale to Burdine was negotiated and effected by W. H. Hensley, the latter in fact acting for his wife and mother, though this was not disclosed by him to Burdine further than the latter was then informed presumably by W. H. Hensley), that appellant had "bid in the land for the Hensleys." Burdine paid the purchase money due by him to the commissioner of court; the latter conveyed the 350 acres of land (the said 400 acres less the 50 acres hereinafter mentioned) to appellant; and appellant made the deed to Burdine of the portion of it aforesaid sold the latter as aforesaid.

It is true appellant, who married a daughter of said appellee and hence was a son-in-law of hers and a brother-in-law of W. H. Hensley, denies the existence of any trust and any declaration of his to the effect aforesaid, but without going into details it is deemed sufficient to say that his action in making the deed to Burdine and otherwise (his statements and explanations on this subject being not convincing) and other statements of his than his declaration above quoted, are clearly proved and are inconsistent with his position that he bought the land for himself. He insists upon the position that all of his dealings in connection with the matter were with W. H. Hensley alone, and that he never knew the said appellee or the wife of W. H. Hensley in the transaction, and he suggests in his testimony that W. H. Hensley's purpose was to shield the land from future liabilities to judgment and other debts of the latter, left unsatisfied from the sale of the land in said suit; intimates that for this reason W. H. Hensley did not purchase the land in his own name; and mentions some non-lien indebtedness of W. H. Hensley to himself (the appel-

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lant). In the pleadings in the cause, appellant made no such issue. Therein he goes no further than to deny the existence of any trust and the allegation that the purchase of the land by him was an absolute purchase for his own benefit alone.

The facts further appear that the appellee as far back as 1892 was the equitable owner of some 130 acres of said 400 acres of land. By reason of the deed aforesaid from W. H. Hensley to his wife the latter became thereunder the owner of the residue of such land, subject to the payment of existing debts of W. H. Hensley. Prior to the whole 400 acres being subjected by its sale aforesaid, a parol partition was made of this land between said appellee and said wife of said W. H. Hensley, by which the 130 acre parcel owned by said appellee was set apart to her by metes and bounds. These metes and bounds were the same as those set out in a deed appearing in the record dated in 1892 purporting to be from said W. H. Hensley and wife to said appellee conveying to the latter such 130 acre parcel of land, but executed and acknowledged by such wife only (hence inoperative) and was not recorded. Said appellee, however, took possession of such land and has continued to live on it ever since, except that part of this parcel was included in the said sale to Burdine, leaving remaining thereof to said appellee the land described and claimed in the bill.

In the progress of said suit, in which appellant purchased the land aforesaid, it developed that W. H. Hensley and wife had conveyed away fifty acres of such land by a deed, good against the creditors whose debts were asserted in such suit, so that when the conveyance was made to appellant by the commissioner of court, only 350 acres of said land was conveyed to him.

Subsequently to his purchase of the land aforesaid appellant had a transaction of an exchange of land with W.

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H. Hensley and wife. Appellant conveyed to the wife of W. H. Hensley a certain tract of land owned by him in consideration of \$250.00 and, as he contends, the whole 350 acres of land aforesaid, which he claims belonged wholly to such wife. He denies the ownership of said appellee of any part of it and all knowledge of said 130 acres formerly belonging to said appellee, or of said partition between the latter and the wife of W. H. Hensley, or of said appellee's ownership of the remainder of such 130 acre parcel after deducting the portion thereof included in the sale to Burdine. But without going further into detail, it is sufficient to say that appellant's statements on this subject also are not convincing. The deed executed by appellant carrying out such exchange is not in evidence, so no light is thrown thereby on the true consideration for it. The preponderance of evidence, including the fact of said occupancy and possession of said appellee, establishes that such exchange by appellant was for the interest of W. H. Hensley and wife only in the 350 acres of land, and did not include the interest of said appellee therein, consisting of the land in the bill mentioned. The relationship and situation of the parties and of the land is such that it seems clear from the whole record that appellant all along knew of the ownership by said appellee of the land claimed in her bill.

The explanation which appellant and his wife in their testimony give of this exchange transaction is that W. H. Hensley complained to appellant that the latter "had not given enough for the land at the sale" and wanted the said exchange made for that reason, and for that reason appellant consented to it. But the preponderance of evidence is against this being a correct explanation of this transaction.

Opinion.

S. H. Bond, for the appellant.

W. S. Cox and *E. T. Carter*, for the appellees.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The question of the validity of express trusts in real estate, created by parol, which was long an open one in this State, is now settled in their favor. *Young v. Holland*, 117 Va. 433, 84 S. E. 637.

It is true the declaration must be unequivocal and explicit and established by clear and convincing testimony. *Taylor v. Delaney*, 118 Va. 203, 86 S. E. 831. As appears from the statement of facts above, however, the evidence in the case before us measures up to this rule.

It is urged in behalf of appellant that in order that a trust, resulting or express, may be established, the purchase money must have been paid by the beneficiary of the alleged trust, and 1 Minor on Real Prop., sec. 467-473, is cited to sustain such position. The learned author cited is, in the sections of his work referred to, treating of trusts created by operation of law or the implied intention of the parties, where there is no express declaration of trust; not of express trusts. 3 Pom. Jur., sec. 987 *et seq.* The trust in suit before us falls within the latter class.

On principle, it is immaterial from whom the consideration is derived to support an express trust. In this particular an express trust created by parol, cannot differ from such a trust created by writing. The consideration may move from any donor of it for the benefit of a *cestui que trust* other than the donor. It need not move from the *cestui que trust*, and usually does not. "All persons who have the capacity to hold and dispose of property can impress a trust upon it" 3 Pom. Eq. Jur., sec. 987. "If a

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trust has been completely declared, the absence of a valuable consideration" (moving from the *cestui que trust*) "is entirely immaterial." 3 Pom. Eq. Jur., secs. 996-7. The declaration, indeed, may come from the donor (when otherwise admissible in evidence), as well as from the trustee. An acceptance by the trustee is all that is necessary to bind him. *Idem*, sec. 1007. A voluntary trust is an equitable gift *inter vivos* and needs no consideration moving from the *cestui que trust* to support it. *Bath Savings Inst. v. Hathorn*, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382. And "it is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it." *Idem*, citing and quoting from *Connecticut River Sav. Bk. v. Albee*, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

It is true that equity will not enforce a trust created for an illegal or fraudulent purpose (Pom. Eq. Jur., sec. 987) and it is contended for appellant that the trust in the case before us was created for a fraudulent purpose—namely, to shield from his creditors whatever consideration W. H. Hensley furnished therefor or whatever interest in or benefit from the property he might acquire thereby. The evidence in the cause does point very strongly toward that conclusion.

But this issue is not made by the pleadings in the cause. A court of equity can decree only upon the case made by the pleadings. *Mundy v. Vawter*, 3 Gratt. (44 Va.) 518; *Grigsby v. Weaver*, 5 Leigh (32 Va.) 215; *Kent's Adm'r. v. Kent's Adm'r.*, 82 Va. 206; *Linkous v. Stevens*, 116 Va. 898, 905-6, 83 S. E. 417; *Murphy's Hotel Co. v. Herndon's Adm'r.*, 120 Va. 505, 91 S. E. 634. This is especially true where fraud is relied on as established by the proof. It must be distinctly alleged in the pleadings, otherwise it cannot be the basis of any decree. *Gregory v. Peoples*, 80 Va. 355; *Welfley v. Shenandoah &c.*, 83 Va. 768, 3 S. E.

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376; *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337; *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Wheby v. Moir*, 102 Va. 875, 47 S. E. 1005. "An answer must aver all the essentials of the defense." *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285. There is no allegation in the answer of appellant in the case before us of any fraud.

It is further contended for appellant that it is contrary to public policy to employ a party to bid in land at a judicial sale and to thus create a secret trust in favor of the wife and mother of the insolvent debtor whose land was sold, that a court of equity will not lend its aid to this kind of a transaction—citing *Horn v. Star Foundry Co.*, 23 W. Va. 522-n. If the transaction is fraudulent and the fraud is put in issue by pleadings in the cause, this position is sound. In the case last cited, the answer of the defendant alleges that the trust sought to be enforced was a device on the part of the real plaintiff to hinder, delay and defraud his creditors. Thus the pleadings put the alleged fraud in issue. The court applied the maxim "where both parties are equally guilty, the defendant shall prevail."

The defect in the position of appellant in the case before us is, as indicated above, that he did not assail or put the character of the transactions in question in issue by his pleading in the cause.

It is further contended that the court below erred in decreeing that a certain portion of the land in question shall be deeded to Eliza Hensley. That if she were entitled to have an express trust enforced, she is only entitled to an undivided one-half interest in the entire tract. This position is not supported by, and is contrary to, the evidence in the case which establishes the trust. That evidence is, in effect, as noted in the above statement of facts, that appellant accepted the trust for Eliza Hensley and Martha E. Hensley; that the interest of the former in the subject of the trust at the time was not undivided, but a specific part

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of the land set apart to her by partition as aforesaid; that this was known to appellant at the time he accepted the trust, as must be inferred from the situation and circumstances surrounding the parties; that such specific portion of land belonging to Eliza Hensley was reduced, by the sale and conveyance aforesaid to Burdine as aforesaid, to the specific parcel of land claimed by her in the bill, so that the latter was entitled to a decree against appellant for a conveyance of such specific parcel of land.

For the foregoing reasons, we find no error in the decree complained of and it will be affirmed.

Affirmed.

Syllabus.

Staunton.

FRALEY V. NICKELS.

September 20, 1917.

1. **ARBITRATION AND AWARD—*Award Conforming to Submission.***—An arbitration agreement in writing submitted to the arbitrators a controversy concerning a boundary line. The agreement provided that the arbitrators should hear such legal evidence pertaining to title as either party might introduce before them.

Held: That the fact that the arbitrators located and reported the boundary line according to an agreement of the parties instead of upon more formal evidence, did not constitute a deviation from their authority. The agreement was the most satisfactory evidence they could have had before them.

2. **ARBITRATION AND AWARD—*Construction of Award.***—Awards are to be liberally construed to the end that they may be upheld if possible.
3. **ARBITRATION AND AWARD—*Participation of all Arbitrators in Award.***—In the absence of some express or implied agreement to the contrary, all the arbitrators provided for in the submission of a controversy between private persons, must participate in the deliberation; and in such a case the award must be concurred in by all of them. The rule is otherwise with reference to controversies of a public nature or of public concern.
4. **ARBITRATION AND AWARD—*Appointment of Umpire—Hearsay Evidence.***—An agreement to submit a controversy concerning a boundary line to arbitration, appointed two arbitrators, and provided that they should select a third. The award was signed by one of the arbitrators named in the agreement and by a third party as arbitrator. The award contained no mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evidence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was

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permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission.

Held: That the writing was no part of the award and was inadmissible as hearsay.

Error to an order of the Circuit Court of Scott county, confirming an award in arbitration proceedings.

Reversed.

The opinion states the case.

S. H. Bond, W. S. Cox and J. D. Carter, for the plaintiff in error.

W. H. Nickels, for the defendant in error.

KELLY, J., delivered the opinion of the court.

On the 18th day of May, 1915, W. H. Nickels and Ephraim Fraley entered into a written agreement whereby they submitted to C. H. Cowden and C. P. Rogers as arbitrators, a controversy concerning a boundary line. The agreement provided that Cowden and Rogers should select a third arbitrator, hear such legal evidence pertaining to title as either party might introduce before them, make their award in writing, and return the same to the clerk's office of the county to be "confirmed by the court according to the statute."

On September 20, 1915, there was presented and filed in the clerk's office a paper dated the 6th day of that month signed, "C. H. Cowden, H. P. Franklin, arbitrators," which recited that Cowden and Franklin as "arbitrators selected by a written agreement herewith filed and bearing date on the 28th day of May, 1915, * * * of Ephraim Fraley

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of the one part, and William H. Nickels of the other part, * * * met at Duffield, Scott county, Virginia, and pursuant to agreement of both of said parties by counsel that the said dividing line between the said Ephraim Fraley and William H. Nickels should be established as follows, to-wit: (setting out the line), we therefore adjudge, order and award that the line aforesaid be and the same is hereby declared, adjudged and awarded to be the true dividing line * * * All of which we submit and return to the clerk's office of Scott county, Virginia."

Subsequently, Nickels notified Fraley that he would proceed to have the report confirmed by the circuit court of Scott county, and when the cause was heard in that court Nickels introduced in evidence the agreement of May 18, 1915, and the award of September 6, 1915, and rested his case. Thereupon, Fraley moved that the proceeding be dismissed on the ground that there was no evidence in the record that Cowden and Rogers had chosen a third arbitrator. Nickels then asked and was permitted, over Fraley's objection, to introduce a writing dated on the — day of September, 1915, which purported to be signed by Cowden and Rogers, and which certified that they had chosen Franklin as the third arbitrator pursuant to the agreement of submission.

The foregoing being all the evidence, Fraley, by counsel, moved the court to dismiss the proceeding upon a number of grounds, the more material of which were, that the purported award did not conform to the submission, that the award was signed by only one of the arbitrators selected by the agreement, and that there was no competent evidence to show that Franklin had been selected as a third arbitrator. The court overruled this motion, and over the objection of Fraley, entered the order here complained of, confirming the award.

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The material assignments of error raise the questions already pointed out as the basis of the several objections made by the plaintiff in error during the course of the trial; and these we shall now proceed to consider.

The award did not, as contended, fail to conform to the submission. The fact that the arbitrators located and reported the boundary line according to an agreement of the parties instead of upon more formal evidence, did not constitute a deviation from their authority. The agreement was the most satisfactory evidence they could have had before them. The award accomplished the purpose of the submission. Awards are to be liberally construed to the end that they may be upheld if possible. *Pollock v. Sutherland*, 25 Gratt. (66 Va.) 78, 4 Min. Inst. 176; *Burks Pl. & Pr.*, p. 28. We have no difficulty in deciding that the award was within the submission.

The award is fatally defective upon its face, however, because it shows that only two of the arbitrators participated in the consideration and decision of the question submitted to them. If Franklin was in fact selected according to the original agreement (which plaintiff in error denies), he was not to act as an umpire but as one of a board of three. Nothing in the agreement, either directly or by implication, confers authority upon a majority to act. Section 5, subsection 3, of the Code of Virginia, invoked by the defendant in error, has no application to this case, but refers to the construction of statutes and to public officers or other persons deriving their authority from a statutory source. Arbitrators in cases like this derive their powers exclusively from the agreement of submission. The authorities are practically unanimous in support of the rule that, in the absence of some express or implied agreement to the contrary, all the arbitrators provided for in the submission of a controversy between private persons, must participate in the delibera-

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tion; and there is scarcely less unanimity in the rule that in such a case the award must be concurred in by all of them. The rule is otherwise with reference to controversies of a public nature or of public concern. These principles are too well settled to require or to warrant any extended discussion. See *Omaha v. Omaha Water Co.*, 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991-997; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320, 3 Cyc. 651-2, 5 Corpus Juris, 96, 2 R. C. L., p. 383, sec. 29; *Omaha Water Co. v. City of Omaha*, 162 Fed. 225, 89 C. C. A. 205, 15 Ann. Cas. 508.

The question does not appear to have been expressly passed upon in this State. The Virginia cases, so far as we have been able to find, upholding majority awards, have been cases in which the agreement of submission contained express or implied authority therefor. *Coupland v. Anderson*, 2 Call. (6 Va.) 106; *Wheatley v. Martin*, 6 Leigh (33 Va.) 62; *Doyle v. Patterson*, 84 Va. 800, 6 S. E. 138. The objection to the award based upon the want of joint action by all the arbitrators should have been sustained.

It was also error to admit the writing purporting to show that Franklin was selected as therein stated. This paper was on part of the award. It was purely hearsay evidence, and was no more admissible than if some witness had gone on the stand and stated that he heard Cowden and Rogers say they had selected Franklin. The evidence was duly objected to, and the objection should have been sustained.

The brief of counsel for the defendant in error contains a very full account of certain transactions alleged therein as having led up to the award, and if the facts as stated in the brief were in the record, they might make

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out a different case. We must, however, of course be governed by the record as certified to us from the trial court, and upon that record it is manifest that the judgment was erroneous and must be reversed and annulled and a judgment entered here dismissing the rule.

Reversed.

Syllabus.

Staunton.

FRENCH v. VIRGINIAN RAILWAY COMPANY.

September 20, 1917.

1. DOCUMENTARY EVIDENCE—*Book Entries*.—Where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the exception to the hearsay rule of books of original entry, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so.
2. DOCUMENTARY EVIDENCE—*Train Sheets*.—Records of entries made in the established course of business on train sheets by train dispatchers from reports telegraphed or telephoned to them by station agents as to the time of arrival and departure of trains are admissible as evidence to indicate the location of a train at a certain time, when verified by the train dispatcher in whose office they were lodged.
3. DOCUMENTARY EVIDENCE—*Train Sheets—Case at Bar—Verification*.—In the case at bar the train sheets were verified by the claim adjuster, an employee of the defendant company, who testified that he had obtained them from the proper custody, and that they were the original train sheets.
Held: That as there was nothing in the record to indicate any doubt of the fact that they were the genuine records under which the trains were operated, they were admissible. While they should have been proved by the train dispatchers who kept them, failure to do so affected, not their admissibility, but their credibility.

Error to a judgment of the Circuit Court of Giles county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

Opinion.

The opinion states the case.

W. B. Snidow, for the plaintiff in error.

H. T. Hall and *G. A. Wingfield*, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This is an action of trespass on the case to recover damages for the destruction of certain growing timber and wood by fire, alleged to have been caused by the defendant company, which resulted in a verdict and judgment for the company.

The only error assigned and relied upon by the plaintiff is the admission as evidence by the trial court of the dispatchers' register of trains of November 21, 1915, the date of the fire.

That records of entries made in the established course of business on train sheets by train dispatchers from reports telegraphed or telephoned to them by station agents as to the time of arrival and departure of trains are admissible as evidence to indicate the location of a train at a certain time, is well settled. *Louisville & Nashville R. Co. v. Daniel*, 28 Ky. L. Rep. 1146, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; *Louisville, &c., Ry. Co. v. Hall*, 29 Ky. L. Rep. 584, 94 S. W. 26; *Donovan v. Boston, &c., R. Co.*, 158 Mass. 450, 33 N. E. 583; *Big River Lead Co. v. St. Louis, &c., Co.*, 123 Mo. App. 394, 101 S. W. 636; *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517, 125 Am. St. Rep. 856, note; *C. & O. Ry. Co. v. Stojanowski*, 112 C. C. A. 310, 191 Fed. 721; *Trowbridge v. Kansas City, &c. R. Co.*, 102 Mo. App. 52, 179 S. W. 782.

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In all of these cases, however, the train sheets were verified by the train dispatcher in whose office they were lodged. In this case they were verified by the claim adjuster, an employee of the defendant company, who testified that he had access to all of the books and records, and that he had obtained the dispatcher's register of trains for Sunday, November 21, 1915, from the division office of the company at Princeton, W. Va. He testified that the register produced was kept by the dispatcher of the said division office from information received by him from other employees of the defendant by telegraph or telephone from stations along its line, and that it was in the handwriting of three men who were the dispatchers on duty on the said date. So that the question to be determined is whether or not this document was sufficiently verified to justify its admission as evidence.

In *Seaboard Air Line Railway v. Railroad Commissioners*, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028, it was held in a proceeding by a railroad company to enjoin railroad commissioners from enforcing a freight rate, that the books of original entry are the best evidence of transactions of the company, and that it would be a practical denial of justice to require it to produce all the way-bills, tickets, reports and other innumerable memoranda made by its multitude of employees; and that the books of account, kept in the regular course of business and containing the original entry of transactions, may be introduced in evidence, but the court must decide, in the first instance, what are the books of original entry, what is sufficient proof of the verity of the books, and what evidence is reasonably available to the one offering the books to prove the entries made therein; and that these questions must be left almost entirely to the discretion of the trial court.

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In discussing exceptions to the hearsay rule and books of original entry as evidence, Mr. Wigmore uses this striking language: "The conclusion is, then, that *where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probability of doing so.* Why should not this conclusion be accepted by the courts? Such entries are dealt with in the same way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation of investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." 2 Wigmore on Ev., sec. 1530.

The train sheets of a properly operated railroad must accurately and properly kept by the train dispatchers,

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else the lives and property of its passengers, the safety of its employees and its own property are all imperiled. Indeed, a railway cannot be operated unless the train dispatchers are kept informed as to the location and movements of its trains. Outside of the court room no one would question the value of these records, for no other practical method has been devised to prevent collisions. Were these particular train sheets sufficiently identified as the record kept by those whose duty it was to keep them? While they should have been proved by the train dispatchers who kept them, failure to do so affects, not their admissibility, but their credibility, and the vital question is not by whom they were proved, but whether or not they were the original train sheets. As the witness who was introduced testified that they came from the proper custody, that they were the original train sheets, and as there is nothing in the record to indicate any doubt of the fact, they are admissible. That the witness could testify to nothing more of his personal knowledge, does not justify their rejection as evidence, for the chief train dispatcher could hardly have testified to any other material fact, and the dispatchers who actually made the entries could have testified to no other fact than that they had made the entries in the performance of their duty, upon reports transmitted to them by the various station agents along the line.

We have here, then, the practical impossibility, on the ground of inconvenience, of producing all the persons who have contributed their knowledge in making up the various entries upon these train sheets, and we also have the circumstantial guarantee of trustworthiness growing out of the fact that the entries were made in the regular performance of duty, and that errors and misstatements in train sheets are almost certain to be promptly detected and to result disastrously. When there is this practical necessity

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and this circumstantial guarantee of trustworthiness, then such records are admissible when sufficiently verified. 2 Wigmore on Ev., secs. 1521-1522.

There have been many decisions which have enforced the strictness of the common law rule in such cases. Some have required that the parties who actually made the record be produced, or their absence accounted for; others have required that the various persons (which in this case would be the station agents along the line) who made the reports upon which the records were based should testify as to the facts within their own knowledge; and still other courts have refused to admit such records under any circumstances. We believe, however, that the sound and the logical principle is indicated by Professor Wigmore, and the following cases sustain the modern and better rule: *Fielder v. Collier*, 13 Ga. 499; *Mississippi, &c., Co. v. Robson*, 16 C. C. A. 408, 69 Fed. 781; *Continental Nat'l Bank v. First Nat'l Bank*, 108 Tenn. 374, 68 S. W. 497, which holds that a bank's books may be verified by the cashier without calling the bookkeeper who actually made the entries; *U. S. v. Cross*, 20 D. C. (9 Mackey) 379; *Schaefer v. Railroad Co.*, 66 Ga. 39; *Chisholm v. Machine Co.*, 160 Ill. 101, 43 N. E. 796; *Northern Pacific R. Co. v. Keyes* (C. C.), 91 Fed. 47; *U. S. v. Venable C. Co.* (C. C.), 124 Fed. 267; *Dohmen Co. v. Insurance Co.*, 96 Wis. 38, 71 N. W. 68. See also, *Diamant v. Colloty*, 66 N. J. Law 295, 49 Atl. 445, 808; *Merchants' Bank of Macon v. Rawls*, 7 Ga. 191, 50 Am. Dec. 398, 125 Am. St. Rep. 856, note; *Architects & Builders v. Stewart*, 68 W. Va. 514, 70 S. E. 113, 36 L. R. A. (N. S.) 899.

Of course extreme caution must be exercised by the trial courts and no evidence of this character should be admitted unless the document comes from the proper custodian and it is proved that it is a record kept in accordance with the established rule of business, made contemporaneously before the controversy arose, by persons under the very high-

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est duty and responsibility to keep a true record. If there be any doubt as to its genuineness, the evidence should be excluded; if it be genuine, such a contemporaneous record is generally the very best available evidence of the facts it purports to record, and, because of the fallibility of human memory as to constantly recurring transactions of similar character, is frequently more worthy of credit than the testimony of witnesses undertaking to testify from personal knowledge. In each case the controlling question to be determined is whether or not the train sheets offered are the genuine record under which the trains were operated. This being settled, the court should admit the evidence, not as conclusive proof, but to be considered by the jury along with the other evidence in the case.

The discretion of the court was properly exercised, the issue involved submitted to the jury, and the judgment based on their verdict determines the case.

Affirmed.

Opinion.

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GARRETT V. SMEAD.

September 13, 1917.

Absent, Burks, J.

1. **APPEAL AND ERROR—Moot Question.**—The appellee, who is the owner and occupant of a dwelling house, obtained a decree enjoining the appellant and a laundry company from maintaining a nuisance in so using the steam laundry, located within one hundred feet of the appellee's dwelling, as to cause smoke, cinders, gases, etc., to be emitted therefrom and carried over the premises of the appellee. Appellant was the owner and lessor of the laundry building, and, as his co-defendant, the laundry company, had dismantled and removed the smoke stack, boiler and furnace of the laundry, thus complying with the decree complained of, a motion to dismiss the appeal must be sustained, as the matter in controversy between the parties is terminated, and any opinion or decision that the Supreme Court of Appeals might deliver would be upon a moot question.

Appeal from a decree of the Circuit Court of Roanoke county. Decree for the complainant. Defendant appeals.

Appeal dismissed.

The opinion states the case.

Caldwell & Chaney and *J. D. Logan*, for the appellant.

R. T. Hubbard and *T. L. Keister*, for the appellee.

WHITTLE, P., delivered the opinion of the court.

Opinion.

The appellee, L. M. Smead, who is the owner and occupant of a dwelling house in the town of Salem, obtained a decree enjoining the appellant, J. P. Garrett, and the Salem Steam Laundry, Incorporated, from maintaining an alleged nuisance in so using their steam laundry, which is located within one hundred feet of appellee's dwelling, as to cause smoke, cinders, soot, ashes, noxious gases and odors to be emitted therefrom and cast over and upon the premises of the plaintiff and into his dwelling and kitchen.

Garrett is the owner and lessor of the building, and his lessee and co-defendant, the Salem Steam Laundry, Incorporated, owned and installed the equipment and conducted the laundry business.

From the foregoing decree Garrett appealed.

We are met at the threshold of the case by a motion to dismiss the appeal because there had been an absolute compliance with the decree complained of, and the matter in controversy between the parties was terminated. Consequently, any opinion or decision that this court might deliver or render would be upon a moot question.

The motion to dismiss was sustained by extrinsic evidence, and the doctrine is well settled that in such circumstances the appeal ought to be dismissed. *Franklin v. Peers*, 95 Va. 602, 29 S. E. 321; *Hamer v. Commonwealth*, 107 Va. 636, 59 S. E. 400; *Roanoke Ry. Co. v. Young*, 108 Va. 783, 62 S. E. 961, 15 Ann. Cas. 946; *Thomas, Andrews & Co. v. Town of Norton*, 110 Va. 147, 65 S. E. 466; *Burks Pl. & Pr.* 754.

Appeal Dismissed.

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HANCKEL AND OTHERS V. HOLCOMBE.

September 20, 1917.

1. *WILLS—Construction—Technical Words.*—When a testator uses technical words, he is presumed to know their technical meaning, and this technical meaning will be ascribed to them.
2. *WILLS—"Bequests"—Construction.*—Although the word "bequests," if given its technical meaning would include a residuary gift, yet where from other portions of the will it clearly appears that the testatrix used the word in the sense of specific bequests, it should be given that meaning.
3. *WILLS—Construction.*—If the testator himself has clearly explained or indicated the meaning which he attaches to a particular word, that meaning must prevail in order to carry out the testator's intent, irrespective of the technical or grammatical meaning of such word.
4. *WILLS—Construction.*—Every part of a will, including codicils, must be construed together in cases of doubt, in order to ascertain the meaning of the testator.

Appeal from a decree of the Circuit Court of Roanoke county. Decree for complainant. Certain defendants appeal.

Affirmed.

The opinion states the case.

Nathaniel T. Green and *Hall & Apperson*, for the appellants.

R. E. Scott, L. H. Cocke, A. P. Staples, Jr., and S. S. Lambeth, for the appellees.

PRENTIS, J., delivered the opinion of the court.

Opinion.

The question to be determined in this case arises under a bill in equity filed by Edward W. Robertson, administrator d. b. n. c. t. a. of Letitia F. Sorrell, deceased, against her legatees and devisees for the construction of her will with three codicils thereto.

That portion of the will which it is necessary to consider in the decision of the question involved reads thus:

"I desire my husband shall sell and reinvest, and use all interest as he sees best—that is he is to sell the land known as the Barrens, all or any portion of it, if he so desires. At his death, I desire that if not sold, all or any portion of it, shall be sold according to the views of my executors and the following legacies paid: To my niece, Letitia Landon Holcombe, \$1,000.00, to my niece Alice Watts Holcombe, \$500.00, to my niece, Elizabeth Bolling, \$500.00, to my nephew, William Watts, \$2,000.00, to my nephew, Hugh Watts, \$1,000.00, to my niece, Jeanie Watts, \$500.00. The remainder of my estate to go to my sister, Alice W. Robertson, and at her death, to her three daughters, Emma W. DuBose, Alice W. Hanckel and Letitia Sorrell Whaley; and to those of her daughters who die without issue, the principle of their proportions as also her mother's portion, shall go to my great niece, Alice DuBose.

"I also leave to my niece, Letitia Sorrell Whaley, the policy on my husband's life—this in fee simple—I desire my nephew, George Morris, to hold the proportion of my estate which will go to my nieces, Emma DuBose and Letitia Sorrell Whaley, and to pay them the interest thereon."

The codicils read thus:

"Sept. 1st, 1900.

"Wishing to make a few alterations in certain bequests,

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I, Letitia G. Sorrel, being of sound mind, though somewhat feeble health, declare this codicil a portion of my will—

“After my husband’s death, Francis Sorrell, I wish, if not already done, that my estate known as ‘the Barrens’ shall be sold, hoping it will bring as much as \$20,000.00 (twenty thousand dollars) I make the following bequests—to my niece, Letitia Landon Holcombe, in recognition of her loving care of me, I give \$2,500 (instead of \$1,000); to my niece, Alice W. Holcombe, I give \$1,000 and also \$1,000 to my niece, Mrs. Elizabeth Bolling—To each of the children of my nephew, J. Allen Watts—Wm. Hugh and Jeanie, I give \$1,000. For a monument for the grave of my dear brother Wm. Watts, I leave \$100.00—To St. John’s E. Church, Roanoke, I leave \$100.00 to aid in arranging the Sunday school room for a chapel. All the remainder of my property I give to my sister, Alice W. Robertson for her life, and at her death, to her three daughters, unless my property should sell for over \$20,000. In that event the various bequests must be increased in due proportions—I mean the bequests to my relatives. I also desire \$50 to be given to my faithful servant, Allen Hawkins, and \$25 to be given to my former servant, Ellen Saunders. Written in my own hand.”

Codicil No. 2.

“This is only to recapitulate in writing, not in figures, my bequests—To my niece, Letty L. Holcombe, twenty-five hundred dollars, to my niece, Alice W. Holcombe, one thousand dollars—To my niece, Elizabeth Bolling, one thousand dollars—To my nephew, Wm. Watts, one thousand dollars—To my nephew, Hugh Watts, one thousand dollars. To my niece, Jenny Watts, one thousand dollars. For a monument over my brother, Wm. Watts, I give one hundred

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dollars. To St. John's Church towards' arranging the S. school room for a chapel, one hundred dollars—To Allen Hawkins, fifty dollars, and to Ellen Saunders, if alive, twenty-five dollars. In my own hand."

Codicil No. 3.

"In my own handwriting, I make this my third codicil. I desire if my property sells for anything over twenty thousand—that two thousand of it shall be held in trust by George Watts Morris for my great niece, Alice DuBose, and five hundred be added to my bequest of twenty hundred to my niece, Letty Landrum Holcombe—anything that should be over, to be added to the other bequests in equal proportions—nothing to be given nor our home dismantled in any way until after my husband's death."

The controversy arises as to the disposition to be made of the excess above \$20,000 of the proceeds of sale of the farm called "the Barrens." It is claimed by the appellants, the two daughters and granddaughter of Alice W. Robertson, the sister of testatrix, that they should share in such surplus proceeds proportionately with certain of the other beneficiaries under the will, who are also nieces and nephews of the testatrix.

There is no difference between counsel as to the general rules applicable to the construction of this will, and, indeed, they each rely upon the same generally accepted canons of construction.

It will be noted that under the original will Alice W. Robertson and her daughters were to receive the entire residue of the estate after the payment of certain specific legacies. Then on September 1, 1900, the testatrix wishing, as she expresses it, to make a few alterations in certain bequests, and in view of the fact that it had occurred to her that the farm "the Barrens" might bring as much as

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\$20,000, she, by the first codicil, increases the specific legacies, provides for a monument at the grave of her brother, and makes gifts to St. John's Episcopal Church, Roanoke, as well as to two of her servants. If there were no other codicils, while there might be some difference of opinion, it is probable that any obscurity which appears in the will would be resolved in favor of these appellants, upon the doctrine that when a testator uses technical words, he is presumed to know their technical meaning, and this technical meaning will be ascribed to them. The language of this first codicil, providing that in case the farm should sell for over \$20,000 the bequests to her relatives must be increased in due proportions, would probably be construed to include her sister and her sister's daughters, because they are certainly relatives, and because the word "bequests" would doubtless be construed to have its technical meaning, and include all the gifts to relatives contained in the will. *Waring v. Waring*, 96 Va. 641, 32 S. E. 153; *Ross v. Ross*, 115 Va. 374, 79 S. E. 343.

It will be noted, however, that in codicil No. 2 (and every part of the will must be construed in cases of doubt in order to ascertain the meaning of the testatrix) she herself expressly limits and interprets the meaning of the language "my bequests." While the avowed purpose of codicil No. 2 is only to recapitulate in writing, not in figures, her bequests, the fact that she only names her nieces and nephews, the legatees to whom she had given specific pecuniary legacies in her will and the first codicil, and makes no reference to Mrs. Robertson or her children, or to that gift, plainly indicates the sense in which the testatrix used the words "my bequests."

The third codicil also manifests the purpose of the testatrix to distribute the surplus proceeds of the sale of "the Barrens" to those to whom she had previously given specific pecuniary legacies, and to exclude Mrs. Robertson and

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her daughters from participation therein. That codicil, referring only to such surplus, provides that out of it shall first come a legacy of \$2,000 to be held in trust by George Watts Morris for her great niece, Alice DuBose, and that \$500 should be added to the bequest to Letty Landrum Holcombe, and that the residue should be added to the "other bequests in equal proportions." It appears to us that the words "in equal proportions" were carefully chosen by the testatrix to express her previously indicated purpose, because in dealing with this surplus in the first codicil she had directed that it be distributed between her specific pecuniary legatees "in due proportions," for it will be observed that in that first codicil these legatees who were to share in this surplus had been given legacies of varying amounts, but when in codicil 3 she added \$500 to the specific legacy of her niece, Letty Landrum Holcombe, and excluded her from further participation in such surplus, it left five specific pecuniary legacies at \$1,000, so that these legacies now being equal in amount the disposition she desired to make of this surplus between these five legatees could unquestionably be better expressed by the words "equal proportions." The words previously used, "due proportions," while most appropriate in order to provide for a proportionate division between legatees who were to receive varying amounts, had now become less appropriate because her intention could be more clearly expressed by the words "equal proportions." Nowhere in the will is that part of her estate which is clearly to go to her sister, Mrs. Robertson, and her daughters referred to as either a legacy or a bequest. In the will it is referred to as the remainder of her estate; in the trust created for Mrs. Robertson's daughters, Mrs. DuBose and Mrs. Whaley, it is spoken of as the *proportion* of her estate; in the first codicil it is referred to as the "remainder of my property," and in the second and third codicils it is not referred to in any way.

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The case is controlled by the rule, that if the testator himself has clearly explained or indicated the meaning which he attaches to a particular word, that meaning must prevail in order to carry out the testator's intent, irrespective of the technical or grammatical meaning of such word.

In *Randolph v. Wright*, 81 Va. 612, it is thus expressed: "and where from the context of a will the testator has explained his own meaning in the use of certain words, the courts will take that explanation as their guide without resorting to lexicographers to determine what is the meaning in the abstract, or to adjudicated cases to discover what they have been held to mean in other wills."

In *Carnagy v. Woodcock*, 2 Munf. (16 Va.) 240, 5 Am. Dec. 470, this is said: "The testator having explained his own meaning in the use of these terms, I shall take that as my guide, without resorting to lexicographers to determine what the same terms ought to mean in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances." *Tebbs v. Duval*, 17 Gratt. (58 Va.) 361; *Moon v. Stone*, 19 Gratt. (60 Va.) 239 (argument); 2 Minor's Inst. (4th ed.) 1055.

The trial court excluded the appellants, Mrs. Robertson's daughters and granddaughters, from participation in the surplus above \$20,000 arising from the sale of "the Barrens" farm, and correctly construed the will, so that its decree must be affirmed.

Affirmed.

Syllabus.

Staunton.

HARMAN V. MOSS AND OTHERS.

September 20, 1917.

1. AGENCY—*Real Estate Brokers—Commission.*—Appellant effected a sale of the timber upon a tract of land, of which he was part owner, in common with appellees and others, under a certain agreement or option by which was granted to the appellant the right of buying or selling the timber on the land at \$10.00 per acre. Appellant did not undertake the sale as an ordinary real estate agent or broker. The sale was of a special character and appellant's situation and qualifications for making the sale were exceptional, and the benefits flowing to appellees as the result of a very advantageous sale were peculiar. Therefore, appellant's compensation for making the sale of the timber should not be measured or governed by the customary commission of five per cent., but should be fixed by the measure of *quantum meruit*, and ten per cent. is not an unreasonable compensation for his services.

2. PRIVATE WAYS—*Compensation for Granting.*—In effecting a sale of timber on land which he held in common with appellees and others, appellant also granted to the purchaser of the timber, as part of the consideration for the purchase price, a right of way over a tract of which he was sole owner.

Held: That the proper measure of compensation for the right of way was the price therefor at which the appellant, under the circumstances, could reasonably have expected to sell it, in connection with the sale of his interest and the other interests which he was authorized to sell in the timber, and in connection also with the sale of the timber on his own tract, and not its salable or condemnation value, independent of its acquisition by the vendee in connection with the purchase of the timber. Nor would a valuation of the right of way on the basis of the price at which the timber in which appellees were interested would have sold, independently and separately from the sale of the timber on appellant's own tract and the right of way across it, be a correct measure of its value.

3. AGENCY—*Sale of Land—Adverse Interest of Agent—Cloud on Title.*—Appellant effected a sale of timber on land which he

Statement.

owned in common with others, and at the same time released to the purchasers a claim for an undivided interest in the land. It appeared from the evidence that the vendee would not have purchased the timber without the inclusion of appellant's claim of title in the sale of it. The title claimed by appellant was not proved to be a valid claim, but it constituted a cloud upon the title and its extinguishment was of value to the vendee of the timber.

Held: That the burden of proof was upon the appellant to show by a preponderance of evidence that the cloud upon the title to the timber had some definite value, and the appellant having sustained the burden of proof which rested upon him by proving in a satisfactory way a definite selling value of a cloud upon the title at the time of the sale of the timber, was entitled to a part of the purchase price as compensation for the release of his claim.

4. TENANCY IN COMMON—*Real Estate Brokers—Sale of Property—Compensation.*—A broker or agent guilty of bad faith to his principal forfeits all commissions or compensation for his services. But in the case at bar where the appellant, under agreement with his co-tenants, under which he made the sale of timber in question, believed he occupied the relation of an optionee purchaser and not that of broker for his co-tenants, he is not guilty of fraud which will bar him from recovering compensation for the sale, in representing to his co-tenants that the timber sold for a less sum than that actually received by him, when he believed that his personal services, money expended, a right of way over his own land, and other considerations, were worth all the purchase price over and above the price named by him to his co-tenants.
5. APPEAL AND ERROR—*Assignment of Error.*—Where the bill expressly stated that appellant was entitled to a reasonable commission or compensation for his services in a sale of timber, the issue that appellant should be denied all compensation for his services, not having been made in the pleadings or in the court below, cannot be made by assignment of error on appeal.
6. COSTS—*Appeal and Error.*—Where the appellees substantially prevailed, in an inquiry before a commissioner, there was no error in the adjudication of the court below of the costs against the appellant.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for complainant. Defendant appeals.

Amended and affirmed.

Statement.

STATEMENT OF THE CASE.

This is the second appeal in this cause. The case on the former appeal is reported in 117 Va. 676, 86 S. E. 111. That appeal involved the decree of the court below entered at the November term, 1913, by which appellees were allowed certain recoveries therein set forth against W. F. Harman the appellant, being purchase money for certain timber sold by appellant to the W. M. Ritter Lumber Company under a certain agreement between appellees and others with appellant of date January 22, 1907. The provisions of that agreement appear from the record and opinion of this court on the former appeal. The decree last named allowed appellant five per cent. commissions on the part of such purchase money coming to appellees, but overruled a motion of appellant that the cause be referred to a commissioner to ascertain and report what compensation appellant was entitled to for services in making sale of said timber.

On said former appeal so much of said decree of November, 1913, as allowed said recoveries against appellant was affirmed, but such decree was amended in so far as it affected the compensation aforesaid claimed by appellant and the further claims asserted by him in his petition for rehearing of the cause on said former appeal, and the cause was, by this court, remanded to the court below with directions to it to refer the cause to a commissioner;

(1) "To ascertain what would be a reasonable compensation to W. F. Harman for making sale of the timber;"

(2) To inquire "into the claim of appellant to compensation for the value of the right of way over the forty-six-acre tract of land described in the record and which is alleged to have entered into the price paid by W. M. Ritter Lumber Company for standing timber; and"

(3) "Into the claim of appellant that the timber on his individual undivided interest in certain land acquired by

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him under the will of his grandfather, Kiah Harman, deceased, also constituted a part of said purchase price."

The decree of this court added: "And if said demand shall be established, said commissioner will ascertain and report the respective amounts thereof."

The cause, upon being remanded to the court below, was proceeded in accordingly. Certain depositions were taken before the commissioner to whom the cause was referred and also before a notary, which, with certain papers, were filed as evidence before such commissioner, in addition to what was already in the record. Thereupon the commissioner reported as follows:

"First: That as to Harman's compensation for making the sale of timber, it should not be measured or governed by the customary commission of five per cent., for the reason that the sale effected by Harman does not fall within the ordinary class of sales, for which a commission of five per cent. is the usual or customary allowance. The facts and circumstances of this case are such as to take it out of the class of the ordinary real estate broker's transactions. The circumstances of this case make it just and equitable that Harman's compensation should be somewhat commensurate to the special character of the sale effected by him and to the peculiar benefits flowing to the complainants as the results of the very advantageous sale, which Harman was able to effect.

"Second: That as to the claim of Harman for compensation for the rights of way over his individual forty-six-acre tract, it is clear that Harman is entitled to a reasonable amount therefor, as there can be no doubt that these rights of way over the said private property of Harman, not only to remove what is known in the record as the Sayers timber, but also to remove other timber belonging to the purchasers, W. M. Ritter Lumber Company, together with other rights and privileges, as set forth in the deed in the

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record in reference to this forty-six-acre tract, were absolutely essential and a prerequisite to the consummation of the deal and trade between Harman and said lumber company, and under all the facts and circumstances of the case, it cannot be denied that the consideration money of \$49,000 represented the purchase price, which the purchaser was willing to pay, not for the Sayers timber alone, but also for the said various rights of way and other rights and privileges in respect to Harman's said forty-six-acre tract, as well as for the release by Harman to the said purchaser of his said individual claim under the will of Kiah Harman as to the seven-ninths interest, in the Sayers timber, that is, all three of these matters (the last two being the individual interest of Harman), unquestionably entered into and made up the full consideration of \$49,000.00, which the purchaser was willing to pay. Without these individual interests of Harman being included by him in his deal with the Ritter Lumber Company, it is clear that no sale of the timber could have been effected, certainly not to this company.

"Third: That as to Harman's claim for compensation for the sale and release to the purchaser, as to the seven-ninths interest in the Sayers timber, of his individual undivided interest in certain land claimed by him under the will of his grandfather, Kiah Harman, it is clear for the reasons last above stated in connection with the rights of way, etc., in the forty-six-acre tract, that Harman is entitled to a reasonable amount therefor, and regardless of any question as to whether this claim of Harman to an undivided interest, under the Kiah Harman will, be in reality a valid claim or not, since it appears that this individual claim of W. F. Harman constituted at least a serious cloud upon the title to the Sayers timber and that the purchaser would not have entered into and closed the deal with Harman, unless this claim of his had been included, and it was included,

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and as above stated, was one of the factors and elements which entered into the agreed purchase money of \$49,000.

"Such being the findings and conclusions of the commissioner upon the three matters arising on this accounting the remaining question is as to the three several amounts which should be allowed to Harman, as against the complainants, Virginia A. Moss and W. G. Moss, her husband, owning two-ninths interest in the Sayers timber, and on this question the commissioner is of the opinion and finds and reports as follows:

"(a) One thousand dollars (\$1,000.00), as of December 28, 1909, to Harman from the complainants, as the amount to which Harman is entitled, at the least, under the finding third above: This being the amount, which the Ritter Lumber Company was willing to pay to Harman (who then asked \$2,000.00) for Harman's adverse interest under the devise of Kiah Harman, as to the two ninths interest in the Sayers timber on the 3149 acres, purchased by the Ritter Company from the Hall Mining Company or J. I. Peery.

"(b) One thousand dollars (\$1,000.00), as of December 28, 1909, to Harman from the complainants, as the amount to which Harman is entitled as a reasonable compensation, under conclusion and finding second above, for the rights and privileges in his forty-six-acre tract, sold and granted by Harman to the Ritter Lumber Company; the value of which rights and privileges in and over the forty-six-acre tract is to be measured and determined, not from the standpoint of its value as a farming proposition, but from the standpoint of its strategic and commanding location and its resulting peculiar value, and the unquestioned right of the owner thereof, in this particular case, to have a reasonable valuation placed thereon from this standpoint of its very peculiar and extraordinary value. If Harman had not included these rights and privileges in his deal with the purchaser, of course, he could have demanded and secured

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from the purchaser the limit to which the purchaser or other party desiring same would be willing to go; but having included same in his deal and trade with the Ritter Company and the value thereof to the purchaser having entered into the total consideration money of \$49,000.00 it is plainly right, just and equitable that Harman is entitled to reasonable compensation for the value of the said rights and privileges in and over his forty-six-acre tract, and that he is not restricted to a measure of recovery, which would allow him just the damage to his land as a farming proposition from the exercise of the rights and privileges.

“(c) Twelve hundred dollars (\$1,200.00), as of December 28, 1909, to Harman from the complainants, as the **amount to which Harman is entitled under conclusion and finding first above**; this amount being ten per cent. of \$12,000.00, which amount of \$12,000.00 represents the complainants’ two-ninths interest in the total consideration money of \$49,000.00 (that is \$14,000.00) after deducting from the said \$14,000.00 the aforesaid two amounts of \$1,000.00 each, allowed to Harman as the valuation of his own individual rights and interests that went into the deal and entered into the total purchase money.

“The aggregate of the three several amounts allowed to W. F. Harman as against complainants, as of December 28, 1909, is the sum of \$3,200.00.”

There were exceptions to this report on the part of both the appellant and appellees.

By the decree complained of on the present appeal the court below overruled all of the exceptions of appellant to said report but sustained the exception of appellee to said allowance of \$1,000.00 to appellant for the one-sevenths undivided interest claimed by him under the Kiah Harman will aforesaid, the provision of such decree in this regard being as follows:

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"The court is further of the opinion that it was incumbent upon the said W. F. Harman to sustain the validity of his claim to an undivided one-seventh interest in the D. Sayers tract of land from which the timber was sold, and offering no proof whatever of the validity of his title to said one-seventh interest, and therefore, the exception filed by the plaintiff to an allowance of \$1,000.00 for this undivided one-seventh interest should be sustained, and said sum of \$1,000.00 is not allowed, but in rejecting this allowance, the court allows said W. F. Harman \$100.00 more on commissions than allowed by the commissioner, so as to make the allowance for commissions 10 per cent. on the net amount of sale, all of which is adjudged, ordered and decreed."

The decree complained of also allowed a recovery against the appellant of the costs of the reference to said commissioner.

Graham & Hawthorne, W. B. Kegley and S. M. B. Collins, for the appellant.

Henson & Bowen, for the appellees.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The assignments of error and cross-error before us raise the questions for our decision which will be disposed of in their order as stated below.

1. What was a reasonable compensation to appellant for his services in making the sale of timber in controversy in this cause?

We think the finding of the commissioner in favor of the appellant on this question, above stated—of 10 per cent. of the share of appellees in the purchase money for said timber—allows the former a reasonable compensation for his services aforesaid, for the reason stated by the commissioner.

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sioner quoted above. The facts and circumstances supporting this finding sufficiently appear from the record on the former appeal, the findings of the commissioner quoted above, the further reference to facts made below, and they need not be here set forth in detail. It is deemed sufficient here to say that this is not a case within the class of a sale by a real estate agent or broker, where the usual commissions of such an agent or broker would be the correct measure of the compensation. Appellant did not undertake the sale as an ordinary real estate agent or broker. That was not his undertaking with or relation to the other parties. Further, the sale was of a special character. Appellant's situation and qualifications for making the sale were exceptional and the benefits flowing to appellees as the result of a very advantageous sale were peculiar. We think the compensation of appellant in question should have been fixed, as it was fixed by the commissioner, by the measure of *quantum meruit*. On the other hand we do not think that, fixed by this measure, the compensation should have been more, as appellant contends it should be.

2. What was a reasonable compensation to appellant for the value of the right of way over the forty-six-acre tract which is alleged to have entered into the price obtained for the timber aforesaid?

We think the finding of the commissioner on this question, above quoted, of \$1,000.00, is reasonable, fair and just to all parties, for the reasons given by the commissioner, also quoted above, further developed below. We think the proper measure of compensation for the right of way was the price therefor at which appellant, under the circumstances, could reasonably have expected to sell it, in connection with the sale of his interest and the other interests which he was authorized to sell in the Sayers estate timber and in connection also with the sale of the timber on his forty-six-acre tract of land. Measured in that way we

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think the commissioner arrived at a correct valuation of such right of way as entering into and making up a part of said purchase money. We do not think that a valuation of such right of way on the basis of its salable or condemnation value, independent of its acquisition by the vendee in connection with the purchase of timber aforesaid, as contended for by appellees, would be a correct measure of such value. Nor do we think that a valuation of it on the basis of the price at which the timber in which appellees were interested would have sold in a sale made of the latter, differently from that in fact made of it, that is to say in a sale of such timber independently and separately made from the sale of the timber on the forty-six-acre tract and the right of way across the latter, etc., as contended for by appellant, would be a correct measure of such value. Both contentions ignore the fact that in the sale under consideration all of the things sold were sold together, their respective values were, therefore, naturally fixed upon by vendors and vendee relatively to each other and were inseparably affected by the advantage to the vendors of selling and the advantage to the vendee of buying all the subjects entering into the sale and purchase. It would therefore bring about a distorted and unfair result to take apart any subject entering into the sale in fact made; regard the sale as made or proposed to be made without this one subject; and then inquire what this separate subject would have been worth as a factor to defeat or to consummate the sale. This would be to ignore the real inquiry we have to make with respect to the transaction as it in fact occurred and substitute an inquiry in regard to a situation which did not in fact exist.

3. At what value did the claim of appellant that he owned a one-seventh undivided interest in certain land acquired by him under the will of his grandfather, Kiah Harman, deceased, enter into the sale of timber in question?

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That this mere claim of title did enter into such sale at some valuation is clearly proved. Judge Strother, counsel for the vendee of said timber, testified positively that the vendee would not have purchased the timber without the inclusion of such claim of title in the sale of it. This being true, it was immaterial that the title claimed was not proved in this suit to be a valid claim. It constituted a cloud upon the title and its extinguishment was of some value to the vendee of the timber.

It is true the burden was upon the appellant to show by a preponderance of evidence that said cloud upon the title to the timber had some definite value, so as to enable the commissioner and court to determine upon the value of it. The proof furnished by appellant on this subject consisted of the testimony of Judge Strother, counsel for the Ritter Lumber Company, as aforesaid, taken by said commissioner. He testified positively that in the early part of 1909 his said company had an option from appellant to purchase the said claim of title, constituting said cloud upon said title, at the price of \$1,000.00 and that such company was then willing to pay that sum for it, in order to extinguish it, had it then been able to make the purchase of timber aforesaid which it afterwards made; but that when the option agreement of November 10, 1909, was made, which covered the aforesaid sale of timber afterwards consummated, the \$1,000.00 option above referred to had expired and appellant then asked \$2,000.00 to extinguish such cloud upon the title. Judge Strother testified that his company was not willing to pay \$2,000.00 to extinguish such cloud on the title. He adds, in answer to another question, "I don't recall at this time whether at that time," (November 1909) "we made him an offer of \$1,000.00 or not, but I am under the impression we were willing to carry out the original agreement with reference to that interest, and when Mr. Harman raised the price to \$2,000.00, we declined to

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purchase." We consider that the whole of this testimony satisfactorily establishes the fact that the said vendee of the timber sold as aforesaid, would have paid \$1,000.00 for said cloud upon the title to such timber in order to extinguish it, had the latter been sold to it separately at the time the timber was sold to it. This proves in a most satisfactory way a definite selling value of such cloud upon the title at the very time in question and sustains the burden of proof which rested upon the appellant on this subject.

4. Should appellant have been denied all compensation for his services in making sale of said timber?

Appellees on cross-assignment of error make this claim under the well settled rule that a broker or agent guilty of bad faith to his principal forfeits all commissions or compensation for his services.

As we have above seen, this case does not fall within the class of cases relied on by appellant. Under appellant's *bona fide* construction of the contract with appellees, under which he made the sale of timber in question, he believed that he occupied the relation of an optionee purchaser and had the right to resell the timber and retain all of the purchase money over and above \$10.00 per acre for the timber. In view of this situation and of the further fact that the vendee had an interest not to have the record disclose the true consideration for the purchase of the timber and other subjects of said sale, the conclusion that appellant was guilty of fraud and deception towards appellees does not follow from the fact that the papers recorded in connection therewith did not disclose the true consideration for such sales. Even with respect to the fact that appellant induced appellees to unite in the deed to said vendee by the representations that appellant sold the timber for \$10.00 per acre and that that was the best price he could get for it and was the amount that he and his wife were to receive, while not a frank statement and not to b

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commended, was one which appellant could have made consistently with his position, which seems to have been *bona fide* on his part. This position of appellant, as appears from the record on this and the former appeal, was that his personal services; money expended; the true value of the timber, his own forty-six-acre tract of land; the said right of way over the latter; the said claim of title derived from his grandfather; his personal undertaking to guarantee to the vendee the passing to it of the interest of one of the parties to the contract, first above mentioned, who was an infant; his personal agreement to save the vendee harmless from any claim of damages by the infant on attaining lawful age and the giving up by appellant of his right to purchase at \$10.00 per acre the timber sold, which was fifteen inches and over in diameter included in said sale, but to which he was entitled under a lease of the coal with certain timber rights, of date April 18, 1908, from appellees and others, were worth all the purchase money over and above \$10.00 per acre which the said vendee was to pay in the transaction of the sale to it of the timber, etc., in controversy in this suit. That is to say, appellant's *bona fide* claim all along seems to have been that said timber itself sold for only \$10.00 per acre.

Moreover, the bill in this cause did not make any issue that appellant was not entitled to any commissions or compensation for his services aforesaid. On the contrary the bill expressly stated that appellant was entitled to "reasonable commissions." The issue that appellant should be denied all compensation for his services not having been made in the pleadings or in the court below, it cannot be made by assignment of error in this court.

5. Should the costs of the reference to the commissioner in the court below have been decreed against the appellant?

In view of the respective contentions of the parties before the commissioner, we are of the opinion that the ap-

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pellees substantially prevailed in the result of that inquiry and we think there was no error in the adjudication of the court below of the costs under consideration against the appellant.

For the foregoing reasons we are of opinion to amend and correct the decree complained of on the subject of the disallowance to appellant of the \$1,000.00 for his claim of title aforesaid derived from his grandfather and the consequential allowance of \$100.00 to appellant on commission more than was allowed by the report of said commissioner and with these corrections and amendments such decree will be affirmed, with costs against the appellees.

Amended and affirmed.

Staunton.

HURT AND OTHERS V. HURT.

September 20, 1917.

1. **WILLS—Personal Estate—Definition.**—The words “personal estate,” in a will, are broad enough to cover intangible personal property as well as tangible property.
2. **WILLS—Construction—Technical Words.**—When technical words are used they are presumed to be used technically and words of a definite legal signification are to be understood as used in their definite legal sense unless the contrary appears on the face of the instrument.
3. **WILLS—Construction—Intention of Testator.**—In the construction of wills the intention of the testator, if not inconsistent with some established rule of law, must control; yet that intention must be found in the language of the testator used in the will; in the meaning of the words used by the testator, when properly interpreted, rather than his presumed or supposed intention.
4. **WILLS—“Use”—Jus Disponendi.**—The word “use” does not in its ordinary meaning import any power of disposition of the *corpus* referred to—the *jus disponendi* of the *corpus*—but the contrary; indeed, only the right to use and enjoy the benefit of the *corpus* is implied by the word “use.”
5. **WILLS—Construction—Jus Disponendi—Case at Bar.**—A testator devised to his executors all his property, both real and personal, in trust during the life of his wife; and provided that the executors should take charge of his “personal estate” and convert the same into money, except so much as his “wife might desire to keep for her use,” and further directed that from the rental of his real estate and the interest from his personal estate, the executors should pay to his wife, as she needed it, so much as would give her a “comfortable support,” “my wife to be judge of the amount she may need.”
Held: That the widow was not given the *jus disponendi* of the intangible personal estate under these provisions of the will.
6. **WILLS—Construction—Construed as of the Date of the Death of the Testator.**—A will is to be construed as of the date of the death of the testator and its provisions cannot be changed to

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meet a contingency not foreseen by the testator. Thus, where a testator made ample provision in his will to insure his widow a "comfortable support" at the time of his death, these provisions cannot be changed to meet a contingency not foreseen by the testator, viz., the increased cost of living since his death.

Appeal from a decree of the Circuit Court of Montgomery county. Decree for defendant. Complainants appeal.

Reversed in part.

STATEMENT OF THE CASE AND FACTS.

This case involves the sole question of whether the appellee, the widow of John B. Hurt, deceased, under the will of the latter, is entitled to and is the absolute owner of the intangible personal property of the estate of such testator?

The solution of this question depends upon the proper construction of the will of said testator of which the following clauses only are deemed material, namely:

"Second: I devise and bequeath to my executors hereafter named all of my property, both real and personal, to be held by them in trust for and during the life of my wife, Sarah L. Hurt; my executors are to keep all my real estate rented, except my dwelling, so long as my wife desires to occupy it; they are to keep my houses in good repair, and see that the taxes and insurance are kept paid; they shall take charge of my personal estate, and convert the same into money, except so much as my wife may desire to keep for her use, and shall loan out the same upon proper security. From the income derived from the rental of my real estate and the interest from my personal estate I direct my executors to pay to my beloved wife as she needs it so much as will give her a comfortable support, my wife to be judge of the amount she may need.

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"Third: After the death of my wife I will and direct that my estate be divided into seven equal parts. I devise and bequeath absolutely and in fee simple to my brother James H. Hurt, one-seventh of my said estate, to my brother W. W. Hurt, one-seventh of my said estate, to my sister Elizabeth Shaffer (wife of John R. Shaffer), one-seventh of my said estate, and to the children of my sister Margaret A. Repass to be divided equally between her said children, one-seventh of my said estate.

"Should either of my brothers above named or my sister die before my wife, then the parent's portion shall go to their descendants if any. If any dies without descendants, then his or her share is to be divided among my other devisees and legatees, in the proportions and according to the conditions and limitations set forth in the other clauses of this my will."

Then follows, in subsequent parts of the will, provisions as to the persons entitled to take such seven parts of the estate "after the death of my wife," as repeatedly stated in the will.

The will is dated October 8, 1911. The testator died on April 20, 1915, and the will was probated on May 3, 1915. The widow was then about sixty-five years of age.

At the time of his death the estate of the testator consisted of real estate, tangible and intangible personal property. The real estate consisted of a thirteen-room dwelling house, located on a large lot of two and three quarter acres in the town of Wytheville, Va., where the testator and his wife resided at the time of his death, and several other houses and lots—rented out—and some vacant land in and near such town which might be cultivated or rented out for cultivation. The tangible personal property consisted of household and kitchen furniture, a Ford automobile and a cow. The intangible personal property consisted of stock in the Wytheville Sanitary Company, money in bank, notes

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and bonds for money lent out, accounts of debts due to testator, and a life insurance policy of \$1,000.00. The appraised value of said property is as follows:

Real Estate—

Said residence and lot	\$ 3,500
Other improved real estate	6,250
Unimproved real estate	2,450

\$ 12,200

Tangible Personal Property 425

Intangible Personal Property—

Said stock	\$ 687 50	
Money in bank	855 23	
Notes, bonds and accounts considered good by executor	3,217 56	4,760

Total estate \$ 17,385

The testator never had a large income. He was deputy clerk of the circuit court for six years, in the latter part of his life, but for several years before his death he was in bad health and had no income except from his property, which at such time was about the same as when he died. He accumulated his estate in small amounts by careful saving. He had no children. He and his wife lived in the residence above named for a number of years before his death. Their manner of life was comfortable but frugal. The wife did the housework except occasionally she would hire extra help and testator did the most of the work about the home, such as caring for the fires, etc., when not too unwell to do so. They kept no servant regularly. In the testator's life time, when heat was needed, they had fires in grates, as well as in the hot water furnace, because they preferred the open fires. The living expenses of testator

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and his wife during the last years of his life were less than fifty dollars per month, including insurance on and up-keep of his property and other expenses incidental thereto, as stated by him, in accordance with the testimony of his widow.

Testator and his wife lived for the most part to themselves. The persons entitled in remainder under said will did not live nor were they much with the testator in recent years, some living in remote States—one nephew not having been heard of by testator for years, as stated in the will.

The widow had at the death of testator and has still, a small separate estate of about \$1,580.00, money lent out at interest, of which \$750.00 was derived from sale of a small parcel of land inherited by her, and the residue she accumulated by small savings.

The executors acting under said will have delivered to said widow all of said tangible personal property for her use, but have not delivered to her any of the intangible personal property.

The widow occupies the said dwelling house and lot, in which she and her husband resided at and before his death as aforesaid.

The executors are paying over to the widow all of the net income derived from the real estate and intangible personal property aforesaid. From this source the widow received during the first thirteen months after testator's death \$698.12, or an average of \$53.70 per month. During the months of May, June and July, 1916, she received \$287.03 of the executors, or \$71.75 per month. Up to September, 1916, a period of seventeen months, she received of the executors \$985.15, or an average of \$57.95 per month. The evidence shows that, as estimated in 1916, the probable net income from such property will be \$700.00 or \$800.00 per year.

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Since testator's death, "little John Hurt," a nephew of testator, about twelve years of age, has lived with the widow and a brother of hers, who lives in the same town, has spent a part of his time with her. With their assistance about caring for the fires and doing chores about the place, the manner of life of the widow has been practically the same as it was before her husband's death. She does practically the same work now as before the testator's death and lives practically as comfortably. It is true that she has dispensed with a phone, which was in the house before her husband's death and that she has not used the automobile since such death, for lack of renewal of the tires to it, and uses the grates for heating the house in winter altogether instead of making use of the hot water furnace. The changes have been made in order to economize, and in August, 1916, when her deposition was taken the widow found the increased expense of living such that it was difficult for her to live on her said income from his estate in the same way that she and her husband lived. She refers also to having had to borrow money twice to pay her expenses but this proved to be a trifling matter of \$2.50 borrowed from a niece and the same amount borrowed later from another to pay that back. The automobile was used but lived in her husband's lifetime.

The heating the house by the hot water furnace doubtless grew more expensive after the testator's death and the loss of the use of the phone was to some extent a discomfort. But the preponderance of the evidence shows that at the time of the death of her husband, even with the increased cost of living, the whole of said net income still received by the widow would have been sufficient to provide a comfortable support for her in that mode of and situation in life to which she had been accustomed to live.

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W. B. Kegley, for the appellants.

W. S. Poage and *Jos. C. Shaffer*, for the appellee.

SIMS, J., after making the above statement, delivered the opinion of the court.

The claim of the widow—the appellee—is that under said will she is entitled to and is the absolute owner of the intangible personal property aforesaid. This claim rests chiefly upon the construction placed upon that portion of the second clause of the will which provides, *inter alia*, that “they (the executors) shall take charge of my personal estate and convert the same into money, except so much as my wife may desire to keep for her use;” and it is contended that by the same clause the wife is to be the judge of the amount she may need. That is to say, it is contended for appellee that the language “personal estate” quoted, includes the intangible as well as the tangible personal estate, and that the *jus disponendi* thereof is in effect given to her by the provisions of the will allowing her “to keep for her use” so much thereof as she “may desire” and making her “the judge of the amount she may need,” bringing the case within the familiar rule laid down in the *May and Joynes Case*, 20 Grat. (61 Va.) 692, and subsequent Virginia cases applying such rule.

The position is also taken in behalf of the appellee that when the “four corners” of the will are examined in the light of the facts and circumstances surrounding the parties at the execution of the will and prior thereto, the will shows that the testator intended his widow to take and use the personalty (intangible as well as tangible) in such manner as she might elect and that this would give her the absolute title thereto.

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In the view we take of the case, it will be unnecessary for us to discuss the rule of *May and Joynes*, or the effect of the amendment to section 2418 of the Code of Va. (see Act of 1908, p. 187) upon that rule.

Counsel for appellee cite a number of authorities to the effect that the language "personal estate" used in the clause of the will under consideration is broad enough to cover intangible personal property. This is undoubtedly correct. They also cite authority (*Ross v. Ross*, 115 Va. 374, 79 S. E. 343), to the point that such, indeed, is the technical and accurate meaning of the language "personal estate" and that "when technical words are used they are presumed to be used technically and words of a definite legal significance are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument"—to quote from the syllabus of the last cited case. This, too, is well settled law. But—

It is also well settled that while it is true that in the construction of wills, the intention of the testator, if not inconsistent with some established rule of law, must control, yet that intention must be found in the language of the testator used in the will; in the meaning of the words used by the testator, when properly interpreted, rather than by the presumed or supposed intention. *Ross v. Ross, supra*.

As said in *Allison v. Allison*, 101 Va. 543-4, 44 S. E. 906, 63 L. R. A. 920: "The object in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used, for the object of construction is not to ascertain the presumed or supposed, but the expressed intention of the testator; that is, the meaning which the words of the will, correctly interpreted, convey."

Another statement of the well settled rule on this subject is contained in the syllabus of the case of *Lindsey v. Eckels*, 99 Va. 668, 40 S. E. 23, and is as follows: "In construing a deed or will, the object is to ascertain the intention

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tion of the maker as gathered from the language used and the general purpose and scope of the instrument, in the light of surrounding circumstances; and when such intention clearly appears by giving the words their natural and ordinary meaning, technical rules of construction will not be invoked to defeat it."

Approaching the will in the case before us, with the guidance of these rules and in the light of the situation and circumstances surrounding the testator, it clearly appears from the language used in the will that he made two provisions "for and during the life of" his wife, for "her use" and "comfortable support." It will be observed, in the first place, that nowhere is she expressly given any power of disposition of the *corpus* of any of the property; a clear and definite disposition by the testator himself being made in the will of such *corpus* in remainder "after the death of my wife" to certain other persons and their descendants. Secondly: the provisions made for the wife are two-fold—she is (1) left in possession merely of "so much" (of the personal estate) as she "may desire to keep for her use;" (2) certain income derived by the executors from the rental of real estate and the interest from the personal estate is to be paid by the executors to the wife "as she needs it so much as will give her a comfortable support, my wife to be the judge of the amount she may need." The executors are directed to "take charge of" all of the personal estate, except that directed to be left in the possession of the wife, "and convert the same into money * * * and shall loan out the same upon proper security." It is clear that the provision of the will making the wife "the judge of the amount she may need" refers, not to the personal estate which is to be left in her possession for "her use," but to the *income* from rental and *interest* the executors are to pay her and to that alone.

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Now with respect to the personal property to be left in the possession of the wife for "her use": The word "use" does not in its ordinary meaning import any power of disposition of the *corpus* referred to—the *jus disponendi* of the corpus—but the contrary; indeed, only the right to use and enjoy the benefit of the corpus is implied by the word "use." *In re Moore's Estate*, 163 Mich. 353, 128 N. W. 199. The only proper "use" to which the intangible personal estate could be put by the wife would be to enjoy the income from it. This "use" of it the will itself expressly provides for, if it was not meant by the will that this property should be left in the possession of the wife, in that it directs that the executors shall convert all of the personal estate not left in the possession of the wife into money "and shall loan out the same upon proper security" and pay over the income therefrom to the wife, "as she needs it," etc. Hence it was not necessary that the intangible personal property should be left in the possession of the wife in order that she might obtain the use of it. The conversion of it into money and the lending of it out by the executors would not have at all interfered with the only proper "use" she could have of it. Not so as to the tangible personal estate. The conversion of that into money by the executors would have destroyed the benefit to the wife of the natural use to which such property could and would be put by her if she retained possession of it.

It seems clear therefore that the personal estate designated by the will as being that of which the executors should not "take charge," but should leave the possession thereof in the wife, was tangible personal property only.

Further: It is true that the tangible personal property kept by the widow for her use, because of its perishable nature may be consumed in the use, and if so consumed, her estate will not be responsible therefor to the remaindermen under said will. But the intangible personal property

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is not of like perishable nature and need not be consumed in its use. Hence no logical inference can be drawn from the inherent nature of tangible personalty aforesaid that the testator meant to include intangible personalty in the property of which the executors should not take charge.

The foregoing conclusions give effect to the whole will, its purposes and intention as expressed therein, in favor both of the life tenant and the remaindermen, and do not allow the technical rule of construction of the language "personal estate" to be invoked to defeat the natural and ordinary meaning with which the language is used in the will before us, in so far as it refers to the property of which the widow is to retain possession.

Again: When it is remembered that the will is to be construed as of the date of the death of the testator, such construction gives effect too to the provision in his will, which the testator then properly regarded as being ample to insure "comfortable support" for his widow during her life. As noted in the statement of facts above, the preponderance of the proof is that, at the time of testator's death, the provisions made in his will for the support of his widow were sufficient to afford her a comfortable support in that mode of and situation in life to which she had been accustomed to live. If the increased cost of living since that time has rendered such provisions made by express provision of the will inadequate for such comfortable support, or should the future increased cost of living induce that result, it is to be deeply regretted, but we cannot on that account change the provisions of the will to meet a contingency not foreseen by the testator. We are satisfied that had he foreseen such a contingency the testator would have made a more ample provision for his widow, to the extent of allowing her the right to the *jus disponendi* of a portion, and perhaps all, of the *corpus*, of his estate, if needed for her com-

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* comfortable support. But clearly he did not do so by his will as he expressed it. We cannot change the expression of his will for him, however much we might like to do so.

For the foregoing reasons we are constrained to the opinion that there was error in the decree complained of, in so far as it adjudged that the appellee was entitled to elect to "keep for her use" the intangible personal property and estate aforesaid, and hence such decree must to that extent be reversed.

Reversed in part.

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Staunton.**JEFFRIES AND OTHERS V. COMMONWEALTH.**

September 20, 1917.

Absent, Sims, J.

1. **CORPORATIONS—*Voluntary Dissolution of Public Service Corporations.***—A public service corporation, created and existing under the laws of this State has, under those laws, the same right of voluntary dissolution which is accorded to all other business corporations.
2. **CONSTITUTION — *Construction—Corporations—Voluntary Dissolution of Public Service Corporations.***—The Constitution of 1902, section 154, provides that: "Provision shall be made, by general laws, for the voluntary surrender of its charter by any corporation, and for the forfeiture thereof for non-user or mis-user." This section in terms embraces corporations of every class, public service corporations as well as others, and there is no satisfactory reason for resorting to rules of construction to construe this language which, in itself, is so conspicuously clear.
3. **CORPORATIONS—*Voluntary Dissolution of Public Service Corporations—Power of Legislature.***—The form and wisdom of the method of voluntary surrender of corporate franchises are matters which were expressly delegated to the legislature by the terms of the Constitution, and as to them neither the Corporation Commission nor the Supreme Court of Appeals can have any controlling voice.
4. **CORPORATIONS—*Voluntary Dissolution of Public Service Corporations—Power of Legislature.***—Code of 1904, section 1105-e, chapter 5, subsection 1, of the act concerning corporations, which provides that, "the provisions of this chapter, except in those cases where, by the express terms of the provisions hereof, it is confined to corporations created under this act, shall be construed to apply to all corporations of this State organized or to be organized for any lawful purpose for which a corporation may be created under this act," is not to be construed as declaring merely that corporations created outside of the act were to be affected just as much as those that were created

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under the act, and as referring to private corporations only in each instance; that the subsection plainly intends to embrace *all* corporations, affirmatively appears from the language of subsection (2) (a) and (2) (h), wherein the terms "charter," "certificate of incorporation" and "articles of association" are used. The legislature evidently meant to designate by the term "charter" corporations already existing, and by the terms "certificate of incorporation" and "articles of association" corporations created under the act.

5. PUBLIC SERVICE CORPORATIONS—*Suspension of Corporate Functions*.—Public service corporations, so far as the general public is concerned, may always suspend their corporate functions in part or in whole, temporarily or finally, with the consent of the State.
6. CORPORATIONS—*Dissolution of Public Service Corporations*.—It was contended that subsection 30 of section 1105-e, as originally enacted, did not refer to public service corporations and that the subsection in its present amended form (Acts 1906, p. 576), contains no broader terms than the original, and therefore cannot be applied to a new class of corporations, but the history of the subsection, and the provisions of other statutes *in pari materia* with it, so far from furnishing any sound argument in support of the claim that it applies only to private corporations, are directly and convincingly to the contrary.
7. CORPORATIONS—*Voluntary Dissolution of Public Service Corporations—Section 1105-e, Subsection 30, Code of 1904, and Section 1294-b, Subsection 16, Code of 1904*.—There is nothing in subsection 1294-b (16), Code 1904, which cannot be acted upon in perfect harmony with everything in 1105-e (30), Code 1904, in its original form; and while both sections, so far as they affected public service corporations, might not have been necessary for the common purpose of each (which was the direction of the disposition of assets), it is to be observed that neither of them provided in terms for a method whereby a corporation might surrender its charter. Therefore, there is no force in the contention that section 1105-e, section 30, Code of 1904, in its original form, could not have referred to public service corporations, because section 1294-b, section 16, Code of 1904, relating exclusively to public service corporations, was written into the statute law of the State at the same time with the original of subsection 30.
8. CORPORATIONS—*Dissolution of Public Service Corporations—Section 1105-e, Subsection 30, Code of 1904*.—At the time of the amendment to section 1105-e, subsection 30, Code of 1904, by

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Acts of 1906, p. 576, provision had been made by statute for the voluntary dissolution of private business corporations and for corporations having no capital stock, but no provision had been made for the voluntary dissolution of public service corporations. The amendment was so drawn as necessarily to embrace in its terms all corporations, and the only reasonable purpose which can be attributed to the action of the legislature in adopting the amendment, is a purpose to complete, by a general and uniform law applicable to all corporations, the work which had been assigned to it by the Constitution.

9. **CORPORATIONS—Voluntary Dissolution of Public Service Corporations.**—Subsection 12 of section 1294-b, Code of 1904, relating to the sale under a deed of trust of the franchises and property of a corporation; subsection 15 of section 1294-b, Code of 1904, relating to such a sale under the decree of a court; and subsection 58 of section 1313-a, Code of 1904, relating to proceedings by *quo warranto* in the event of nonuser or misuser by a corporation organized for works of internal improvement, in no way deny the right of a public service corporation to voluntarily dissolve as prescribed by subsection 30, section 1105-e, Code of 1904.
10. **STATE CORPORATION COMMISSION—Powers—Corporations Intending to Dissolve.**—The State Corporation Commission exists and derives all its powers from the Constitution and statute laws of the State; and there is no word or hint in the Constitution and statutes passed pursuant thereto which shows that the visitorial and inquisitorial powers conferred upon that body have any relation whatever to corporations intending to dissolve and cease to do business as such. These powers plainly relate to going concerns.
11. **CORPORATIONS—Voluntary Dissolution—Power of State Corporation Commission.**—Code 1904, section 1105-e, subsection 2, i, which authorizes a corporation "to wind up and dissolve itself in the manner provided in this act," applies to public service corporations, and subsection 30 of section 1105-e, Code of 1904, prescribes the manner, leaving only a ministerial function in regard thereto with the commission.
12. **CORPORATIONS—Voluntary Dissolution of Public Service Corporations—Constitutionality of Section 1105-e, Subsection 30.**—Subsection 30 of section 1105-e, Code of 1904, providing for the voluntary dissolution of corporations is not unconstitutional when extended to public service corporations as unduly curtailing the powers of the State Corporation Commission. The commission must look to the Constitution and laws pursuant thereto for its powers, and the powers therein conferred

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do not extend beyond the control and regulation of corporations continuing to hold on to and exercise their corporate franchises.

13. CORPORATIONS—*Constitutional Law—Section 154 of the Constitution.*—Section 154 of the Constitution of 1902, provides for the creation, extension and amendment of charters of every kind, under general laws to be enacted by the General Assembly; the preservation of the right of repeal by the State and the delegation to the General Assembly of the power and duty of providing, as it might see proper, but by general law for the voluntary surrender of the charter of any corporation, regardless of its class—a reservation to the State of the power of repeal, and a consent by the State to a voluntary dissolution. This section of the Constitution cannot be construed so as to exclude public service corporations from the direction in regard to voluntary dissolution, unless they are also excluded from the operation of every other part of the section.
14. PUBLIC SERVICE CORPORATIONS—*Interest of the Public—Charters of incorporation* are contracts between the incorporators and the State. The public has an interest in public service corporations, but it does not own them. Private property invested in a railroad enterprise becomes impressed with a public service, but still remains the property of the stockholders and cannot be confiscated. The public has never yet been held to have a vested right in the perpetual operation of a railroad or other public service corporation.
15. STATUTES—*Constitutional Law—Object Should be Expressed in Title—Mandatory Act.*—Subsection 30 of section 1105-e, Code of 1904, as amended Acts of 1906, page 576, is not unconstitutional as violating section 52 of the Constitution, providing that no law shall embrace more than one object, which shall be expressed in its title. The act which amended subsection (30) of chapter 5 was entitled, "An act to amend and re-enact section (30) of chapter 5 of an act entitled an act concerning corporations, which became a law on the 21st of May 1903" (Acts 1906, page 576). The title of an act amending the Code is sufficient if it refers to the chapter and section to be amended and the body of the amendatory act is within itself germane to the subject of the chapter referred to in the title.
16. STATUTES—*Constitutional Law—Object Should be Expressed in Title—Mandatory Act.*—Wherever the title of the original act sufficiently complies with section 52, Constitution of 1902, the title of subsequent amendatory acts is a matter of no consequence.

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17. **CORPORATIONS—Dissolution of Public Service Corporations—State Corporation Commission—Issuance of Certificate.**—The issuing to a public service corporation a certificate of dissolution, as provided for in subsection 30, section 1105-e, Code of 1904, by the State Corporation Commission, is a ministerial and not a judicial function, and the argument that the function in question is too important to be a ministerial act is readily answered by the terms of the Constitution and statutes relating to the tremendously important subject of the creation of corporations, as to which the commission can only act ministerially.
18. **CORPORATIONS—Dissolution of Public Service Corporations—Jurisdiction—Application for Receiver.**—Upon the filing of a certificate of unanimous consent of stockholders to the dissolution of a corporation, as provided by section 1105-e, subsection 30, Code of 1904, with the State Corporation Commission, the sole question before that body was whether the company had complied with the law entitling it to a certificate of dissolution. If it had, it was the duty of the commission to issue the certificate, and no court (except on appeal) could enter any order that would "interfere with the commission in the performance of its official duties." And the appointment of a receiver for the corporation between the filing of the certificate of consent and its final amendment as to signature and execution, is no reason for refusing a certificate of dissolution, if otherwise it should have been granted.

Appeal from an order of the State Corporation Commission, refusing to issue a certificate of dissolution of a corporation upon an application by the stockholders.

Reversed.

The opinion states the case.

E. Randolph Williams and B. Rand. Wellford, for the appellants.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General Leslie C. Garnett, Leon M. Bazile, C. V. Meredith, Willis B. Smith, J. E. Cannon, Haskins Hobson, M. P. Bonifant, W. M. Smith and W. M. Justis, Jr., for the Commonwealth and others.

KELLY, J., delivered the opinion of the court.

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The paramount question in this case is whether public service corporations created and existing under the laws of this State have, under those laws, the same right of voluntary dissolution which is accorded to all other business corporations. The constitutional and statutory provisions on the subject seem to us to plainly answer the question in the affirmative.

"The creation of corporations, and the extension and amendment of charters (whether heretofore or hereafter granted) shall be provided for by general laws, and no charter shall be granted, amended or extended by special act, nor shall authority in such matters be conferred upon any tribunal or officer, except to ascertain whether the applicants have, by complying with the requirements of the law, entitled themselves to the charter, amendment or extension applied for, and to issue, or refuse, the same accordingly. Such general laws may be amended or repealed by the General Assembly; *and all charters and amendments of charters, now existing and revocable, or hereafter granted or extended, may be repealed at any time by special act. Provision shall be made, by general laws, for the voluntary surrender of its charter by any corporation, and for the forfeiture thereof for non-user or mis-user.* The General Assembly shall not, by special act, regulate the affairs of any corporation, nor, by such act, give it any rights, powers or privileges." (Italics added.) Virginia Constitution, 1902, sec. 154.

It is under this section of the Constitution that the General Assembly has proceeded to enact the general laws now in force in this state regarding the creation of corporations, their division into classes, the amendment and extension of their charters, and the corporate powers, privileges and limitations. That the section in terms embraces corporations of every class is so plain that no argument to prove the proposition could make it plainer, and none to disprove it could raise a question in any reasonable mind. This we

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believe to be either directly or indirectly conceded in the multiform arguments presented in this cause for the purpose of placing upon the section a construction which would except public service corporations from the operation of the provision therein directing the General Assembly to provide "by general laws for the voluntary surrender of its charter by any corporation." All such arguments come, as they manifestly must come, from considerations outside of the plain language selected by the framers of the Constitution in their well known care and purpose to clarify and unify the corporation laws of the State. These extraneous arguments will be considered in the further course of this opinion. It is sufficient in this immediate connection to say that we have been unable to regard them as of any convincing force. We are constrained to accept the section as it stands, and believe that no satisfactory reason has been shown for resorting to rules of construction to construe the language which, in itself, is so conspicuously clear. (See authorities cited by Judge Prentiss in *London Bros. v. National Exchange Bank of Roanoke*, 93 S. E. 699, decided at this term.)

Taking the Constitution, therefore, at its word, it is to be expected that the General Assembly has obeyed its mandate and has provided by general laws for the voluntary surrender of the charter of any corporation, regardless of its class; and the next orderly step is to inquire whether that body has done so—not how well or how wisely. The form and wisdom of the method of voluntary surrender of corporate franchises are matters which were expressly delegated to the legislature by the terms of the Constitution, and as to them neither the Corporation Commission nor this court can have any controlling voice.

Coming then to a consideration of what the legislature has done in this respect, we find that in addition to the special powers conferred and restrictions imposed on rail-

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road corporations (the one involved in this case belonging to that class) in chapter 2 of the Virginia "act concerning corporations," it is provided that they "shall have all the general powers and be subject to all the general restrictions conferred and imposed on corporations by chapter 5 of this act and the laws of this State relating to corporations so far as applicable thereto." Code, section 1105-b, subsection (2).

Chapter 5 of the act (section 1105-e, Pollard's Code 1904) provides, in subsections (1) and (2), as follows:

"(1) The provisions of this chapter, except in those cases where, by the express terms of the provisions hereof, it is confined to corporations created under this act, shall be construed to apply to all corporations of this State organized or to be organized for any lawful purpose for which a corporation may be created under this act, but shall not be construed to enlarge the powers of corporations chartered under chapter four of this act.

"(2) Every corporation of this State shall have power

"(a) To have succession for the time stated in its charter, certificates of incorporation, or articles of association. But when no period is so limited, it shall be perpetual, subject to the power of repeal reserved by the Constitution to the General Assembly," and, further,

"(i) *To wind up and dissolve itself, or to be wound up and dissolved in the manner provided in this act.*" (Italics added.)

One of the contentions in this case, which may be most conveniently adverted to just here, is that even if public service corporations are embraced in the direction contained in section 154 of the Constitution with reference to the enactment of general laws for the voluntary surrender of charters, still subsection (1) of 1105-e does not mean to include such corporations in all the provisions in chapter 5 of the act, but simply meant to declare that corporation

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created outside of the act were to be affected just as much as those that were created under the act, and was referring to private corporations in each instance. The first and natural impression to be obtained from a reading of the language of subsection (1) is directly to the contrary of this contention, and the language must be considerably strained to give any color at all to the argument. That it has no such meaning as is here contended for, and plainly intends to embrace *all* corporations, affirmatively appears from the language of subsections (2) (a) and (2) (h), wherein the terms "charter," "certificate of incorporation" and "articles of association" are used. The legislature evidently meant to designate by the term "charter" corporations already existing, and by the terms "certificate of incorporation" and "articles of association" corporations created under the act. Considering the nomenclature of the act, these are apt, if not necessary, terms for that purpose, and they were plainly so used.

The specific statute with which we are concerned in this case is subsection (30) of the same chapter (Code, section 1105-e), in which it is provided that "whenever, in the judgment of the board of directors, it shall be deemed advisable and for the benefit of any corporation organized under this act, or under any charter heretofore granted by any court, or by the General Assembly of Virginia, that it shall be dissolved," the board may take certain steps therein provided, which, if two-thirds in interest of the stockholders shall consent, will result in a voluntary dissolution and a settlement of the affairs and business of the corporation by the board of directors; and it is therein further provided that "*whenever* all of the stockholders shall consent to the dissolution, no meeting or notice thereof shall be necessary, but on filing the said consent in the office of the State Corporation Commission, the said commission shall issue a certificate of dissolution, *and the said corporation shall there-*

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upon stand dissolved, and the said board shall proceed to settle up and adjust the business and affairs of the said corporation; provided, however, that no such dissolution shall affect the rights of any creditor of the said corporation existing at the time of such dissolution.' (Italics added.) Acts 1906, chapter 327.

The appellants in this case, being all of the stockholders of the Tidewater and Western Railroad Company, which obtained its charter from the Corporation Commission in 1905, filed their unanimous consent to the dissolution of that corporation with the State Corporation Commission. This consent was certified in accordance with the provisions of subsection (30), upon a form prescribed by the State Corporation Commission for the voluntary dissolution of corporations, similar to those which had theretofore been prescribed by the commission for use by stockholders intending to bring about a voluntary dissolution of corporations, regardless of whether they were public or private in their nature. Some question is made as to the exact date when this consent in duly executed form was presented to the commission, but this question is of altogether minor importance. It is sufficient for the purposes of this case and in this connection to say that the certificate, as first presented to the commission on May 10, 1917, was genuine in the authorization of the signatures thereto, and was true in its certification of the previously given unanimous consent of the stockholders; and that it was accepted by the chairman of the commission as being in all respects in due form on May 17, 1917.

A number of persons, including the boards of supervisors of Powhatan and Cumberland counties, all claiming to be interested in and affected by the proposed dissolution, asked leave to file their petitions protesting against the granting of the certificate of dissolution; and, the matter having been formally presented and heard before the commission,

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that body, on the 5th of June, 1917, entered an order rejecting the petitions of the intervenors, but also refusing to issue the certificate.

In this result, Honorable Christopher B. Garnett, chairman, and Honorable J. R. Wingfield, commissioner, concurred. The remaining member of the commission, Honorable Wm. F. Rhea, dissented. All three of the commissioners filed written opinions, setting out at some length the reasons for their respective conclusions. The chairman of the commission did not directly pass upon the question whether subsection (30) of section 1105-e applied to public service corporations, but held that, if it did, other general provisions in the Constitution and the common and statute law of the State of Virginia must be so construed as to give the Corporation Commission the right to withhold the certificate until, in its judgment, it was satisfied that the dissolution ought to be permitted. Commissioner Wingfield concurred in the result, but rested his opinion mainly upon the proposition that subsection (30) was unconstitutional because in its present amended form the title of the act amending the same was in violation of section 52 of the Constitution, providing that "no law shall embrace more than one object, which shall be expressed in its title." Commissioner Rhea dissented on the ground that the constitutional and statutory provisions on the subject were plain and mandatory, that the function of the commission was purely ministerial in respect to the voluntary dissolution of corporations, and that the commission had no discretion or authority to inquire into the facts and circumstances prompting the stockholders in bringing about the dissolution. No reference is made to section 154 of the Constitution in either of the opinions supporting the majority view of the commission, and in neither is there any claim that the statutes we have quoted do not in terms, and standing alone, embrace corporations of every class. The

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arguments advanced to support the conclusion, both in the opinions themselves and in the briefs of counsel, as previously observed, all proceed from extraneous sources and considerations. The dissenting opinion takes section 15 of the Constitution as the starting point, and regards the statutes in question as the natural outgrowth of that supreme authority and mandatory direction.

We have given to the vast array of authorities cited by the commissioners and by counsel to support the view that public service corporations may not voluntarily and arbitrarily suspend or withdraw their public service, the careful consideration which the importance of the subject and the earnestness and ability of those presenting that view demand. They deal, however, with perfectly familiar principles, and we fail to find therein anything in conflict with the conclusion that public service corporations may under the laws of this State, voluntarily surrender their charters and cease to do business. Those authorities, in the main if not entirely, relate to corporations not intending to dissolve and go out of business altogether, but to those proposing to suspend only in part the exercise of some particular public service which they have undertaken still holding on to their corporate franchises; and, even so, the clear result from such authorities as a whole is that public service corporations, so far as the general public is concerned, may always suspend their corporate functions in part or in whole, temporarily or finally, *with the consent of the State*. It is abundantly safe to say, unless for fear of stating what ought to go without saying, that all the authority for the proposition that such corporations may not on their own accord cease to exist, presupposes the absence of consent to that course by the State which created them. This principle, indeed, is necessarily conceded in the contention that if subsection (30) of section 1105-e applies to railroad companies, the dissolution cannot be per-

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fectured until the Corporation Commission has been satisfied that good reason for it exists. If the commission has the power to give consent, it has such power only as the *alter ego* of the State; and the fault in the argument lies in the failure to observe that in this instance the State, through its Constitution and statutes, has given the consent by a general and uniform law applicable to all corporations, and has left no discretion with the commission in regard to it.

Bearing in mind what all must concede, that the law-making power in the State may always provide, in such manner and upon such terms as it may deem best, for the voluntary dissolution of corporations of every kind, it is difficult to see how this power could have been more plainly conferred than has been done in the language of the statutes already quoted; and this conclusion does not become less apparent upon a consideration of the reason urged to the contrary.

(1) The one common ground upon which the advocates of the decision appealed from unite in their arguments is the assumption that it would be unwise and unsafe to permit public service corporations to dissolve without some notice to the public and some inquiry into the circumstances. They have realized, however, that before this consideration can be brought into play as an aid to the construction of the constitutional and statutory provisions which we have discussed, they must show some other constitutional or legislative declarations indicating that the former provisions, despite their plain terms, were not intended to mean what they say; since, if they do mean what they say, that is the end of the inquiry, the very questions of expediency and prudence having been expressly delegated to and finally passed upon by the legislature. With a view, therefore, to showing that the provisions of section 154 of the Constitution and 1105-e, subsection (30) of the Code were not intended to embrace public service corpora-

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tions, in so far as they authorize a voluntary dissolution without notice to or investigation by some representative of the public, a great variety of contentions have been urged upon us. These contentions are too numerous and too diverse to be discussed fully and in detail in an opinion of reasonable length. We shall endeavor to deal with those upon which special reliance seems to be placed. It may be said to be significant, however, that the learned counsel who oppose the issuance of the certificate of dissolution have not agreed upon any one contention which they have seemed to regard as satisfactory and decisive. If we are to decide that the framers of the Constitution and the members of the general assembly, in dealing with a matter peculiarly within their province and power, so clearly said one thing when they meant another, it would seem that there ought to be some patent and convincing reason readily recognizable by everybody, upon which to base the decision.

(2) A leading contention urged upon us is that subsection (30) of 1105-e, as originally enacted, did not refer to public service corporations and that the subsection in its present amended form contains no broader terms than the original, and therefore cannot be applied to a new class of corporations. We do not think the premise for this argument is correct, nor, if it were, that the conclusion from it would follow as claimed. The history of the subsection, and the provisions of other statutes *in pari materia* with it, so far from furnishing any sound argument in support of the claim that it applies only to private corporations, are directly and convincingly to the contrary.

The terms of the subsection, so far as material, have already been quoted. They were embraced in an extensive amendment made by the act of March 20, 1906 (Acts 1906 p. 576). The original was as follows:

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"All corporations, whether they expire by their own limitation or are otherwise dissolved, shall, nevertheless, be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which said corporation shall have been established."

The contention under consideration is that this section in its original form could not have referred to public service corporations because section 1294-b (16), one of the sections found in chapter 54-a of the Code, relating exclusively to public service corporations, was written into the statute law of the State at the same time with the original of subsection (30), and that as section 1294-b (16) provided specially for winding up the affairs of a defunct or dissolved public service corporation, the legislature could not have had such corporations in contemplation in the enactment of subsection (30) in its original form. We think, however, that there is no conflict or inconsistency between these two sections. There is nothing in subsection 1294-b (16) which cannot be acted upon in perfect harmony with everything in 1105-e (30), in its original form; and while both sections, so far as they affected public service corporations, might not have been necessary for the common purpose of each (which was the direction of the disposition of assets), it is to be observed that neither of them provided in terms for a method whereby a corporation might surrender its charter. The duty to do the latter had been delegated to the legislature. In section 1294-b (16) it had undoubtedly contemplated the expiration of public service corporations by limitations in their charters or by a dissolution thereof without any further continuation of the business. In chapter 1 of the "act concerning cor-

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porations" the legislature, Code, section 1105-a (11), had made practically the same provision for the voluntary dissolution of private business corporations as was written into the amendment of section 1105-e (30). Indeed, the chairman of the commission says that "the purpose of the amendment was to write into chapter V provisions similar in effect to those already applicable to private corporations in section 11 of chapter 1;" and Commissioner Wingfield says that the eleventh section of chapter 1 "is imported bodily into" the amendment. But why any purpose to import and write this section into chapter five by an amendment? The importation was useless and meaningless unless it was done to provide for a voluntary dissolution by public service corporations (under chapters 2 and 3), as to which no method or form of procedure for that purpose had been prescribed. When it is recalled that at the time this amendment was passed its leading provisions were already embodied in section 11 of chapter 1, relating to private business corporations; that there was no such provision in either chapter 2 or chapter 3 (secs. 1105-b and 1105-c) relating to public service corporations; that there was a kindred but different provision (1105-d, 8), chapter 4, relating to corporations having no capital stock; and that the amendment is so drawn as necessarily to embrace in its terms all corporations, as well under chapters 2, 3 and 4 as under chapter 1, the only reasonable purpose, as it seems to us, which can be attributed to the action of the legislature in adopting the amendment is a purpose to complete, by a general and uniform law applicable to all corporations, the work which had been assigned to it by the Constitution. We can see no inconsistency between 1294-b (16) and 1105-e (30), nor between the latter and 1294-b (12), 1294-b (15), or 1315-a (58), further mentioned below; but we cannot understand how the legislature could have

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passed 1105-e (30) in its amended form without expressly intending to embrace public service corporations in its terms.

(3) Closely related to the contention just disposed of is the argument that subsection (30), both in its original and present form, cannot be held to embrace public service corporations because there are sundry other provisions in our laws relating to the dissolution of such corporations. Thus it is said that subsection (12) of section 1294-b, relating to the sale under a deed of trust of the franchise and property of the company, expressly contemplates and provides for a continuation of the business by a new corporation to be formed by the purchaser; that the same is true of subsection (15) of 1294-b, relating to such a sale under the decree of a court; and that the same is true of subsection (58) of 1313-a, relating to proceedings by *quo warranto* in the event of non-user or mis-user by a corporation organized for works of internal improvement. Not one of the provisions in any of these statutes, however, in any way denies the right of a public service corporation to voluntarily dissolve in the manner provided for in the act. The end in view in all of them is necessarily dependent upon the finding of some purchaser who is willing to assume the burden and accept the privileges of the franchise offered for sale thereunder. When these provisions are read in connection with subsection (16) of 1294-b and subsection (30) of 1105-e, it becomes manifest, as we think, that the legislature simply intended to encourage, and, as far as possible, provide for the reorganization of defunct and dissolved corporations by new capital, but had no idea of denying to public service corporations the right to voluntarily dissolve.

(4) Another and most insistent contention is that to permit the voluntary dissolution of a railroad or other public service corporation would, to a large extent, nullify the

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power conferred upon the Corporation Commission to regulate and control corporations of that character. The commission exists and derives all its powers from the Constitution and statute laws of the State; and there is no word or hint in the Constitution and statutes passed pursuant thereto which shows that the visitorial and inquisitorial powers conferred upon that body have any relation whatever to corporations intending to dissolve and cease to do business as such. These powers plainly relate to going concerns. If they ought to have been extended further, the remedy lies with the source of the authority. The same argument here made would extend to banking and insurance and any other private corporations over which the commission now has or may hereafter be given visitorial powers; and yet there is and can be no claim that, as the law now stands, any private business corporation may not voluntarily and without notice surrender its charter and go out of business. In all such cases, so far as creditors and outstanding contracts are concerned, the jurisdiction remains, where it always has been, with the courts.

This argument based upon the constitutional powers of the commission goes so far as to insist that if section 1105-e, subsection (30), was intended to confer on public service corporations the power to dissolve voluntarily, the subsection can only be given a conditional and qualified effect, dependent upon notice to the public and discretionary action by the commission. It is clear, however, that the statute must be taken as it is and as a whole, and not accepted in part and rejected in part. If it applies at all, then the corporation is given the power, under 1105-e (2), i, "to wind up and dissolve itself in the manner provided in this act;" and 1105-e (30) prescribes the manner, leaving only a ministerial function in regard thereto with the commission. But it is said that if this be the case, the subsection is unconstitutional because it would unduly curtail the pow-

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ers of the commission. This, we think, is answered in the observation already made that the commission must look to the Constitution and laws pursuant thereto for its powers, and that the powers therein conferred do not extend beyond the control and regulation of corporations continuing to hold on to and exercise their corporate franchises. This is manifest, as we think, from the very language of the constitutional and statutory provisions upon which the argument under consideration is based; and the question is conclusively settled by the specific direction contained in section 154 of the Constitution, that the legislature shall provide by general laws for the surrender of the franchise of any corporation. We cannot exclude public service corporations from this latter direction, unless we also exclude them from every other part of section 154; and to do this we would be brought to the necessity of deciding that the Constitutional convention of 1901-2, after all its labor and pains with the subject of corporations, entirely overlooked public service corporations in the special and only section of its work which relates to the incorporation of business enterprises and the surrender or repeal of charters of incorporation. What section 154 of the Constitution plainly did was to provide for the creation, extension and amendment of charters of every kind, under general laws to be enacted by the General Assembly; to preserve the right of repeal by the State; and to delegate to the General Assembly the power and duty of providing, as it might see proper, but by general laws, for the voluntary surrender of the charter of any corporation, regardless of its class—a reservation to the State of the power of repeal, and a consent by the State to a voluntary dissolution.

This underlying plan and principle of section 154 is only fair and just. Charters of incorporation are contracts between the incorporators and the State. The public has an interest in public service corporations, but it does not own

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them. Private property invested in a railroad enterprise becomes impressed with a public service, but still remains the property of the stockholders and cannot be confiscated. The public has never yet been held to have a vested right in the perpetual operation of a railroad or other public service corporation. Section 1294-b (16) of the chapter of the Code of Virginia relating exclusively to public service corporations very clearly contemplates the possibility of a complete dissolution and a termination of the franchise of such a corporation, followed by a distribution of "the proceeds of its works, property and debts among those entitled thereto," who, of course, would be the creditors and stockholders.

That inconvenience and hardship may and probably will result when railroads and other public utilities cease operations is undeniably true; but the same thing is just as likely to be true, in greater or less degree according to the character and extent of the corporate enterprise, of the dissolution of purely private corporations, concerning which no question is made as to their right to dissolve without notice. There are thousands of our citizens and hundreds of our communities to-day dependent almost entirely upon the operation of the plant of a single industrial corporation. Their hope lies in the principle that persons engaged in such enterprises will not be likely to give them up as long as there is reasonable profit or prospect of profit in the business. The same principle will likewise in large measure protect patrons of railroad companies against a surrender of their charters. Whether the law, as it now exists, is sufficiently safeguarded or not, there is no power anywhere to compel the stockholders of a corporation, public or private, to continue indefinitely the prosecution of a losing business. The law permitting the voluntary dissolution of public service corporations has been on the statute books of this State for more than ten years, has been recognized

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and accepted as the law of the land by the representatives of the Commonwealth, and no very disastrous consequences appear as yet to have followed.

And in this immediate connection it is pertinent to add, that until the question arose in this case, the terms of section 1105-e (30) have been accepted and applied to public service corporations by the State Corporation Commission, not only as formerly constituted, but as organized at present. As early as 1908 the commission submitted the question to Hon. Wm. A. Anderson, whose opinion as a distinguished member of the Constitutional Convention is entitled to great respect, and who at the time of the inquiry addressed to him was the Attorney General of the State and, as such, the legal adviser of the commission. He replied as follows:

"Any corporation, whether organized under the act concerning corporations, which became a law on the 21st day of May, 1903, and the acts amendatory thereof, or under any charter heretofore granted by any court, or by the General Assembly, may be dissolved as is expressly provided for in section (30) of chapter V of said act concerning corporations (as said section was amended by the act approved March 20, 1906) in the manner prescribed in that section; and the affairs of such corporation may be wound up and its property disposed of, and its debts and liabilities paid or provided for, subject to the provisions of section (31), (32), (33) and (34) of that chapter; and where the franchises and property of the corporation are sold under a deed of trust, or a decree of court, they may be sold in accordance with the provisions of section (36) of chapter V of said act.

"As I understand the inquiry, the corporation to which it relates is a railroad company. I do not find any provision in the act concerning corporations which excepts rail-

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road corporations from the operation of the enactments in regard to the dissolution of corporations generally above referred to."

This opinion by Attorney General Anderson we believe to be in accordance with the plain letter of the statutes on the subject. The State Corporation Commission, composed personally of the same learned and distinguished men who participated in the consideration and decision of the instant case, have heretofore acted upon this interpretation, as shown by the records of the commission and the concession of counsel, and particularly by the written statement of the chairman, under date of April 27, 1917, with reference to the dissolution of the Ocean View Railroad Company, in which, quoting from subsection (30) of 1105-e, he said: "There is no discretion left to the commission in the matter of issuing such an order, as the law is mandatory whenever all the stockholders of the corporation consent to the dissolution." It is true that after the order complained of in this case, denying the certificate, had been entered, the chairman wrote a second letter to the party to whom the communication last above quoted from was addressed, explaining that, upon the investigation of the present case, he had changed his mind. With great deference, we think the first impression of the chairman was the better. His change of view, as his opinion shows, was the outcome of a solicitous and commendable regard for the interest of the public and his fear of possible consequences to the public from a different conclusion. The latter consideration, however, is one which, as we have seen, has been committed to and rests with the legislature. The powers of the Corporation Commission are large and its functions are of great importance; but in its control over corporations these powers and functions do not extend beyond the point of requiring corporations to comply with the terms of their charters and the laws of the State.

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The record indicates that the Tidewater and Western Railroad Company, like its unfortunate predecessor, was doomed to failure, and that a dissolution, either voluntary or involuntary, was inevitable; so that, in the instant case, the result in the end would perhaps not have been very materially different if the law had authorized an inquiry by the commission. We must not be understood, however, as intending to detract from the argument that there should be some safeguards against the voluntary cessation of the business of a public service corporation; and we are informed that the revisors of the Code, appreciating the desirability of some further legislation on the subject, have incorporated into their work of revision an amendment to section 1105-e, subsection 30, which, if adopted, will require notice to the public and the consent of the commission before the corporation can voluntarily dissolve.

(5) The contention that section (30), as amended, is unconstitutional because it violates section 52 of the Constitution, providing that no law shall embrace more than one object, which shall be expressed in its title, is, as we think, wholly untenable. The act which amended subsection (30) of chapter 5 was entitled, "An act to amend and re-enact section (30) of chapter 5 of an act entitled an act concerning corporations, which became a law on the 21st of May, 1903" (Acts 1906, page 576). The five chapters adopted by the General Assembly in one comprehensive act under the title now perfectly familiar to the profession as "an act concerning corporations," were intended to codify the law of this State with respect to charters of incorporation. To hold that the act amending subsection (30) of chapter 5 is insufficient in its title would discredit the validity of the entire act, and would disregard the settled interpretation placed on section 52 of the Constitution by previous decisions of this court. The original subsection (30) related to the general subject of the dissolution of all

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corporations, and the section as amended does the same thing, but in a more complete and comprehensive manner.

In the case of *Bertram v. Commonwealth*, 108 Va. 902, 62 S. E. 969, it was held by this court, following the leading case of *Commonwealth v. Brown*, 91 Va. 762, 771, 21 S. E. 357, 28 L. R. A. 110, that the title of an act amending the Code is sufficient if it refers to the chapter and sections to be amended and the body of the amendatory act is within itself germane to the subject of the chapter referred to in the title. The principle of the decision in those cases would seem to apply in the present instance. The subject matter contained in subsection (30), as amended, is manifestly within the scope of the original "act concerning corporations," which, though perhaps not strictly speaking a part of the Code, is of great dignity and importance, and is substantially a part of the Code by legislative authority. (Acts 1902-3-4, p. 437). The question, however, is set at rest by the established principle that wherever the title of the original act is sufficient, the title of subsequent amendatory acts is a matter of no consequence. In the case of *District Road Board v. Spilman*, 117 Va. 201, 84 S. E. 103, Judge Whittle, delivering the opinion of this court, said: "In considering this branch of the subject too, the principle is not to be lost sight of, that where an act is amendatory of an original act, the title of which in itself is adequate to cover the amendment, the constitutional requirement is satisfied and the subsequent title becomes unimportant." See also, *Miller v. Hurford*, 13 Neb. 13, 12 N. W. 832, 834, and cases cited; *Dallis v. Griffin*, 117 Ga. 408, 43 S. E. 758, 759; and especially *Commonwealth v. Brown*, *supra*, 91 Va. 773, 21 S. E. 357, 28 L. R. A. 110, and authorities there cited, and *Tresnon v. Supervisors*, 120 Va., 90 S. E. 615.

(6) In emphasizing the importance of the powers vested in the commission by the Constitution, the point is made

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that there never could have been any intention on the part of the law-makers to delegate to the commission in a purely ministerial capacity the discharge of so important a function as that of issuing to a public service corporation a certificate of dissolution, and Commissioner Wingfield goes so far as to say that "in no case can this commission be considered a mere ministerial body." Nothing could be further from our purpose than to speak lightly of the State Corporation Commission and the importance of its judicial and administrative functions. Throughout the past years of its existence it has rendered a distinguished and valued service, and the decisions of this court will show few reversals of its findings. But the argument that the function now in question is too important to be a ministerial act is readily answered by the terms of the Constitution and statutes relating to the tremendously important subject of the creation of corporations, as to which the commission can only act ministerially; and the legislature could not, if it desired, confer upon the commission any judicial or discretionary power in regard thereto. (Const. sec. 144).

(7) It appears that between May 10, 1917, the time of the filing of the original certificate of unanimous consent of the stockholders, the due and formal execution of which was questioned by the chairman of the commission, and May 17, 1917, the time of its final amendment as to signatures and execution in such form as to satisfy the chairman in that respect, the Tidewater and Western Railroad Company applied to the Chancery Court of the city of Richmond for the appointment of a receiver, and a receiver was accordingly appointed. The chairman of the commission, in his written opinion, and counsel seeking to sustain the judgment complained of, rely upon this proceeding in the chancery court as a reason for refusing the certificate of dissolution, if we should hold that otherwise it ought to have been granted. The question, of course, is quite sub-

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ordinate to the main issue. It appears not to have been made at the hearing before the commission. In no event, however, could it have had any proper influence upon the action of the commission. The sole question before that body was whether the company had complied with the law entitling it to a certificate of dissolution. If it had, it was the duty of the commission to issue the certificate, and no court except on appeal) could enter any order that would "interfere with the commission in the performance of its official duties." (Const., sec. 156.) This was not a conflict or contest for jurisdiction between the two tribunals having concurrent powers, but if it had been, the matter was already pending before the commission, as the commission knew and as the record in the chancery case showed, and nothing could have been done in the chancery cause to defeat the jurisdiction of the commission. Moreover, the receivership, as disclosed by the bill and decrees in the cause, was entirely consistent with the dissolution proceedings, and might very properly have been brought, as it may yet very properly be proceeded with, after the issuance of the certificate. The status of all corporations, after dissolution, is expressly preserved by the statute for the purpose of "prosecuting or defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which said corporation shall have been established." A receivership suit may often be, as in this case, perfectly consistent with and in aid of the limited purposes for which the corporation, after its formal dissolution, is thus kept alive.

We may well conclude this discussion with the following extract from the opinion of Commissioner Rhea, which we approve and adopt:

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"The duty imposed upon the commission, in my judgment, is purely ministerial, and if it never acted the legal status of a corporation would be fixed upon the filing of the consent of the stockholders.

"The law may be unwise, but it is useless to discuss this. Its enforcement will doubtless work serious hardships, and I exceedingly regret this result. This commission, however, should follow the law as it is plainly written in the statute. Any other course would be fraught with danger to all citizens, both corporate and otherwise. The legislature alone can make laws, and it is supposed that we will fairly but firmly execute them. If the law is wrong, the legislature alone must be appealed to. * * * I will not discuss the question upon which so great a part of the majority opinion is based, of abandonment or discontinuance of service by public service corporations, without notice and without the approval of the State Corporation Commission. That proposition is controlled by entirely different principles, which have no application here. There is no question here of abandonment or discontinuance of service as those terms are understood in our law. This is purely a question of the dissolution of a corporation in the manner provided by statute, and we have no power to prevent it where the statute has been complied with as it has been, in my judgment, in this case.

"I do not understand the pertinency of the discussion in the majority opinion of the subscriptions of various localities to the stock of the old Farmville and Powhatan Railroad Company, predecessor of the Tidewater and Western. It is to be deplored that this unfortunate investment, along with the investment of other stockholders, was wiped out by a judicial sale, purchase and organization of a new company under the name of the Tidewater and Western Railroad

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Company. It is also to be regretted that the new company seems to have inherited many, if not all, of the ills and misfortunes of its predecessor.

"The effect of a receiver having been appointed since this application was filed, and to which so much attention is given in the majority opinion * * * is, in my opinion, immaterial. This matter was argued orally and submitted upon briefs upon the question of dissolution, and the receivership then existing was neither argued nor relied upon, but, in my view, this is also immaterial, for the reason that the corporation was, in effect, dissolved when the consent application was filed, and the Corporation Commission only had a ministerial function to perform of issuing the certificate. Whatever financial difficulty the Tidewater and Western may have had for many years past, and the losses sustained by its owners and bondholders, is not necessary for me to discuss now. It may be that the receivership was hastened by our non-action. At all events, I take it in a proper case the courts could have proceeded by the appointment of a receiver whether we had acted upon the application or not."

For the reasons above stated, the judgment must be reversed and the cause remanded to the Corporation Commission, with direction to issue the certificate of dissolution.

Reversed.

Syllabus.

Staunton.

JOHNSTON V. PEARSON.

September 20, 1917.

1. **PARTIES TO ACTION—*Executors and Administrators.***—As the personal property of the decedent is the primary fund for the payment of his debts, his personal representative is a necessary party to a suit by which such fund is affected. He is a proper party to a suit by a judgment creditor to subject his debtor's lands to the lien of his judgment; but where the pleadings admit that the debtor died without personal assets and no relief is sought against his personal representative and no accounting by him is asked, he is not a necessary party.
2. **APEAL AND ERROR—*Harmless Error—Dismissal, Discontinuance and Nonsuit.***—A bill was filed by a judgment creditor against the administrator and heirs of the deceased debtor, to subject her land to the lien of the judgment. The bill alleged that the debtor owned no personal property at the time of her death, out of which the judgment could be collected. The administrator and one of the heirs filed separate pleas of the statute of limitations. At the hearing the complainant asked leave to dismiss his suit as to his administrator, which motion the administrator resisted. The court, however, permitted the dismissal.
Held: That the administrator was a proper party and the suit should not have been dismissed as to him. But the error in permitting complainant to dismiss as to the personal representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator.
3. **PROCESS—*When Returnable.***—Section 3220 of the Code of 1902 provides that process, whether original, mesne or final, shall be returnable within ninety days after its date, and that process shall be issued before the rule day to which it is returnable, but may be executed on or before that date. All three kinds of process are embraced in the same class and put upon exactly the same footing, and, it having been determined that

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original and mesne process returnable more than ninety days after its date is void, final process, or process of execution, must share the same fate.

4. **EXECUTIONS—Returnable After Ninety Days—Void or Voidable.**—In a suit to subject the land of a deceased debtor to a judgment lien, one of the heirs filed a plea of the statute of limitations, setting forth that only one execution had issued on the complainant's judgment within ten years from its date, and that the execution so issued was returnable more than ninety days from its date, and hence was void.

Held: That an execution returnable more than ninety days from its date was not merely voidable, so that its invalidity could not be set up in a suit to enforce the judgment, but was void; and that fact might be shown by anybody, anywhere and at any time.

5. **MAY—Shall—Statutes—Mandatory or Permissive.**—As used in section 3577, Code of 1904, providing that on a judgment execution may issue within a year, *may* is permissive, whereas *shall* as used in section 3220 of the Code, providing that process shall be returnable within ninety days after its date, was mandatory.
6. **PROCESS—Waiver.**—The doctrine of waiver has no application to a void process.

Appeal from a decree of the Circuit Court of Giles county.
Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

W. B. Snidow, for the appellant.

Williams & Farrier and *Jackson & Henson*, for the appellee.

BURKS, J., delivered the opinion of the court.

This is a bill filed by a judgment creditor against the administrator and heirs of the debtor, who had died, to sub-

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ject her land to the lien of the judgment. The bill alleged that the debtor owned no personal estate at the time of her death, out of which the plaintiff's judgment could be collected. No answer was filed by either of the defendants, but the administrator and one of the heirs filed separate pleas of the statute of limitations, setting forth that only one execution had issued on the complainant's judgment within ten years from its date, and that the execution so issued was returnable more than ninety days from its date, and hence was void. Special replications were filed to each of said pleas, but they denied no facts stated in the pleas, and at best amounted to no more than demurrers. At the hearing the complainant asked leave to dismiss his suit as to the administrator, which motion the administrator resisted. The court, however, permitted the dismissal, and, proceeding to hear the case on its merits, decided that the execution, though returnable more than ninety days after its date, was not void but voidable only, and, not having been avoided, the judgment constituted a lien on the defendant's land. From that decree this appeal was taken.

Two errors are assigned by the appellant:

1. That the trial court erred in permitting the appellee to dismiss his suit as to the administrator of the judgment debtor.

As the personal property of the decedent is the primary fund for the payment of his debts, his personal representative is a necessary party to any suit by which such fund is to be affected. He was a *proper* party to this suit and it should not have been dismissed as to him, but (notwithstanding what is said in *Beall v. Taylor*, 2 Gratt. [43 Va.] 535, 44 Am. Dec. 398) where the pleadings admit that the debtor died without personal assets and no relief is sought against his personal representatives and no accounting by him is asked, he was not a *necessary* party. But the error in permitting the plaintiff to dismiss as to the personal rep-

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representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator.

2. The second error assigned is the ruling of the trial court, that an execution returnable more than ninety days from its date is a merely voidable process and not void.

If the execution be merely voidable, it is valid until avoided, and its invalidity cannot be set up in a suit to enforce the judgment, as this would be a collateral attack upon the judgment, which is not permissible (*Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 309), but if it be void, it is a nullity, and that fact may be shown by anybody, anywhere and at any time.

If the question were *res integra*, we might find difficulty in holding the execution in this case to be a void process in the sense of an absolute nullity, but we cannot hold it to be merely voidable without overruling a number of prior decisions of this court and endangering vested rights.

Section 3220 of the Code provides that process, whether original, mesne or final, *shall be returnable* within ninety days after its date, and that process *shall be issued before the rule day to which it is returnable*, but may be executed on or before that date.

In *Noell v. Noell*, 93 Va. 433, 25 S. E. 242, the summons to commence the suit was made returnable on the date of its issue, and it was held that the provision of the statute was mandatory, and that the return and all records based thereon and proceedings had were *void*.

In *Lavell v. McCurdy*, 77 Va. 763, a *scire facias* dated April 11, 1871, was made returnable to the next term of court, which was held September 8, 1871, more than five months after the date and service of the writ, and it was held that the *scire facias* and the judgment rendered thereon were void and not voidable.

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In *Lowenbach v. Kelley*, 111 Va. 439, 69 S. E. 352, a *scire facias* was made returnable more than ninety days after its date, and for that reason was held to be a void process.

In *Kyles v. Ford*, 2 Rand. (23 Va.) 1, it is said: "The act of 1819, before cited, directs that all process shall be returnable either to the first day of the next court, or to some previous rule day. The process in this case was not returnable either to the court or to a previous rule day; the rule day to which it was returnable and the first day of the court being the same. The consequence is, that the *scire facias* was merely void. Process made returnable to a day which is not a legal return day is void."

In *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548, the prior Virginia cases on the subject of process returnable to a day other than that provided by statute were cited with approval, and it was held that a summons in garnishment which was returnable to a day other than that provided by statute was not simply irregular but void. To the same effect see 20 Enc. Pl. & Pr. 1159, and cases.

It is true that in a number of States a different construction is put upon original and mesne process from that placed upon final process (Freeman on Ex. [3d. ed.], sec. 44, and cases; 17 Cyc. 1022), but our statute declares that process, whether original, mesne or final, *shall be* returnable within ninety days after its date. All three kinds of process are embraced in the same class and put upon exactly the same footing, and it having been determined that original and mesne process returnable more than ninety days after its date is *void*, final process, or process of execution, must share the same fate.

Counsel for the appellee relies upon the case of *Beale v. Botetourt Justices*, 10 Gratt. (51 Va.) 281, to sustain his contention that *final* process which does not conform to the statutory requirement is not void but voidable only. In that case execution was issued on a judgment more than

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twelve months after the date of the judgment, and it was held that the execution was voidable only; but the statute under which it was issued was merely permissive; the statute (Code, section 3577) providing that "on a judgment execution may issue within a year," whereas the statute in the instant case declares that process *shall* be returnable within ninety days after its date.

Counsel for appellee also relies upon Freeman on Executions (3d ed.), sec. 44, and cases cited. The section relied on is, in part, as follows:

"Designating the return day. The period within which the execution is to be returned differs in the different States, being regulated by local statutes. At common law, the time for the return was designated in the writ, and this practice still obtains in most, but not in all, of the States. It has sometimes been held that an error in the return day, or, in other words, the designation in the writ of a return day at a time different from that designated by law, was fatal, but this view is entirely without the support of reason, and is now opposed by a decisive majority of the reported adjudications upon this subject. In fact, there is no mere matter of form from which a departure could be of less detriment to the parties. The provision for a return day is beneficial mainly, if not solely, to the plaintiff, because it fixes a time when he may expect to obtain the fruits of his judgment, by compelling the sheriff to have the writ satisfied, if satisfaction can be had. The defendant has no interest in the return day, for the writ, as soon as sued out, may and ought to be levied, whether it be returnable in ten days or in six months. And whether the time for the return day be material to defendant or immaterial, he ought not to be precluded from waiving his rights; and if he does waive them, either in express terms or by silent acquiescence, the waiver ought to be irrevocable."

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In addition to what has already been said on the subject, it may be added that the defendant is vitally interested in the return day of an execution under the Virginia statute, because the life of the judgment is dependent upon the return day of the execution, and if the plaintiff in the execution may extend the return day beyond the limit prescribed by the statute for a single day, he may extend it for a year, or for any other time, and thereby prolong the life of the judgment beyond the period prescribed by statute.

Section 3577 of the Code provides as follows: "On a judgment, execution may be issued within a year, and a *scire facias* or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued or a *scire facias* or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; * * *"

It manifestly was never the intention of the legislature to put it in the power of the plaintiff to extend the life of a judgment beyond the time prescribed by law. The return day of the execution, therefore, may be a matter of vital interest to the defendant.

With reference to what is said by Mr. Freeman on the subject of waiver, it is sufficient to say that the doctrine of waiver has no application to a *void* process.

For these reasons, the decree of the Circuit Court of Giles county must be reversed and the bill of complainant dismissed, with costs to the appellant in this court and in the court below.

Reversed.

Syllabus.

Staunton.

**LONDON BROTHERS AND OTHERS V. NATIONAL EXCHANGE
BANK OF ROANOKE, VIRGINIA, AND OTHERS.**

September 20, 1917.

1. **ASSIGNMENTS—General Contractor—Mechanics' Liens.**—Section 2482-a, Code of 1904, provides that no assignment or transfer of any debt due or to become due to a general contractor by the owner for the construction or repairing of any structure for such owner, shall be valid until the claims of all subcontractors, supply men, etc., against such general contractor for labor and materials furnished in and about the construction of such structure shall have been satisfied.
Held: That the language of the act was too plain to need construction, and that its benefits could not be confined to subcontractors, material men, etc., who had perfected mechanics' liens, which in the case at bar it was admitted they could not have done because the owner of the building in question was a municipal corporation.
2. **ASSIGNMENTS—General Contractor—Mechanics' Liens.**—Section 2482-a, is not only simple and unambiguous in its language but its purpose is lawful as well as laudable, and is plainly manifest. There is no ambiguity therein, whether considered as a separate and independent statute or in connection with the mechanics' lien statutes. Section 2482-a discourages the assignment by the general contractor of any part of the debt due or to become due him by the owner for the construction of the building, by providing that such assignment shall not be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt, unless and until, the claims of all subcontractors, supply men and laborers against such general contractor for labor performed and material furnished in and about the construction, erection and repairing of such building, shall have been satisfied.
3. **STATUTES—Interpretation and Construction.**—All rules for the construction of statutes are subservient to the legislative intent; and when this is clear from the language used, rules of interpretation give way—the maxim being that it is not allow

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able to interpret that which has no need of interpretation. Furthermore, this intention is to be gathered from the words used unless a literal interpretation would lead to a manifest absurdity.

4. ASSIGNMENTS—*Mechanics' Liens*—Section 2482-a, Code of 1904—*Procedure*.—Section 2482-a, Code of 1904, completely protects the owner of the building, and the case at bar fully illustrates its effectiveness as a remedy for every interested party. All that the owner has to do in case such an assignment is made is to follow the example of the owner in the instant case—pay the money into court and convene the claimants of the fund, and relieve himself of all responsibility in connection therewith. If he does not know the claimants of the fund, then he can take advantage of the statute (section 3230 of the Code of 1904) which authorizes complainants who think that there may be persons who are interested in the subject whose names are unknown, to make them parties to the suit by the general description of "parties unknown," and on proper affidavit to have them convened by order of publication.

Appeal from a decree of the Law and Chancery Court of the city of Roanoke. Decree for complainant. Defendants appeal.

Reversed.

The opinion states the case.

Johnston & Izard, Poindexter & Hopgood, Jas. A. Bear, Willis & Adams, A. P. Staples, A. B. Hunt, Spiller & Burks and Chas. T. Jesse, for the appellants.

Woods, Chitwood & Coxe, Jackson & Henson and S. H. Graves, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The city of Roanoke filed its bill of interpleader, showing that it owed the sum of \$20,999.20, the balance of the contract price for the municipal building constructed for it by

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the King Lumber Company, as general contractor, and that the National Exchange Bank, as assignee of such general contractor, its trustees in bankruptcy as well as appellants, subcontractors of the King Lumber Company who had furnished materials, labor or supplies in the construction of the said building, were all claimants of the fund, and prayed that it might be properly distributed under the direction of the court.

All of the defendants filed answers to the bill, and it appears that on the 22nd day of April, 1916, the King Lumber Company assigned \$15,000 of the amount due for the construction of the building to the National Exchange Bank, without first having paid the laborers, supply men and subcontractors. These laborers, supply men and subcontractors claim under the act entitled, "An act to protect subcontractors, supply men and laborers" (Acts 1895-6, p. 379, printed in Pollard's Code as sec. 2482-a), that such assignment cannot be enforced until their claims have been fully satisfied. This act reads as follows:

"No assignment or transfer of any debt, or any part thereof, due or to become due to a general contractor by the owner for the construction, erection, or repairing of any building, structure, or railroad for such owner shall be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt unless and until the claims of all subcontractors, supply men, and laborers against such general contractor for labor performed and materials furnished in and about the construction, erection, and repairing of such building, structure, or railroad shall have been satisfied; provided, that if such subcontractors, supply men, and laborers shall give their assent in writing to such assignment it shall be thereby made valid as to them, but the pay-

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ment or appropriation of such assignment by the owner without such assent in writing shall not protect such owner from the demands of such subcontractors, supply men, and laborers to the extent of such assignment.

"No debt or demand, or any part thereof, due or to become due by the owner of any building, structure, or railroad to a general contractor for the construction, erection, or repairing of such building, structure, or railroad shall be subject to the payment of any debt or the lien of any judgment, writ of *fiery facias* or any garnishee proceeding obtained or sued out upon any debt due such general contractor which shall have been contracted in any other manner or for any other purpose than in the construction, erection, or repairing of such building, structure, or railroad for such owner unless and until the claims due by such general contractor to all subcontractors, supply men, and laborers for materials furnished and labor performed in and about the construction, erection, or repairing of such building, structure or railroad shall have been paid."

It is contended for the bank that this act must be read and construed in connection with the mechanics' lien laws, sections 2475-2481 inclusive of the Code, and that if so read and construed it does not protect the petitioners because they had not perfected mechanics' liens, and it is admitted that they could not do so because the owner of the building, the city of Roanoke, is a municipal corporation.

In the view that we take of the case, it is unnecessary to notice the contention of the trustees in bankruptcy of the King Lumber Company, because they have no interest in the fund in any event. It may be noted further that it is suggested in the argument and is not denied that there has been a composition between the bankrupt and its creditors, and that its trustees have relinquished all claim to the fund involved.

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The trial court, by two decrees entered on the same day, April 26, 1917, determined that the appellants, the laborers, supply men and subcontractors had no interest in the fund under its control, that the assignment to the bank was valid as against the appellants, and decreed that it should be paid in full, with interest, out of the fund, and that the surplus should be paid to the trustees in bankruptcy of the King Lumber Company, and refused to suspend the entry of the decree for four days—that is, until the 30th of April, 1917, which was the date set for the consideration by the District Court of the United States for the Western District of Virginia of the offer of composition made by the bankrupt to its creditors—although it appeared that if the composition should be confirmed the trustees in bankruptcy would relinquish all claim to this fund; and from these decrees this appeal is taken.

In their effort to sustain these decrees, counsel for the bank exhibit the greatest industry, learning and ability in the discussion of the rules for construction of statutes in which there are ambiguities, latent or patent. In our view, however, it is unnecessary for us to refer to all of these rules, because we are of opinion that the statute, section 2482-a, is not only simple and unambiguous in its language but that its purpose is lawful as well as laudable, and is plainly manifest. There is no ambiguity therein, whether considered as a separate and independent statute or in connection with the mechanics' lien statutes.

It is claimed that in order to harmonize the statutes we should interpolate into this act, after the words, "until the claims of all subcontractors," the additional words "who shall have perfected mechanics' liens in accordance with the provisions of the Code."

The effect of such an interpolation would be so to change the meaning of the statute as to defeat its manifest purpose.

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For many years it has been the wise and just policy of this State to require that the laborers and supply men whose work and material create the fund arising from the construction of buildings, shall be paid out of the said fund in preference to the general contractor. Pursuant to this policy the mechanics' lien laws create and provide for the perfection and enforcement of liens upon the building or structure and so much land therewith as may be necessary for the convenient enjoyment of the premises. Section 2479 of the Code further provides, that upon giving notice in writing to the owner of the building, the subcontractor may make the owner personally liable to him. None of these provisions are in conflict with section 2482-a here involved. That section was enacted pursuant to the settled policy of the state and as a further protection to those claimants who are so favored by the law because their labor and property have produced the value. There is no conflict whatever between these statutes, and construed together they create no ambiguity, but simply deal with different phases of the same subject.

Section 2482-a discourages the assignment by the general contractor of any part of the debt due or to become due him by the owner for the construction of the building, by providing that such assignment shall not be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt, unless and until the claims of all subcontractors, supply men and laborers against such general contractor for labor performed and material furnished in and about the construction, erection and repairing of such building shall have been satisfied. Such language as this is too plain to need construction. The statute says simply what it means, and therefore simply means just what it says. To attempt to expound tends to becloud instead of to elucidate its mean-

ing. The words of the statute are written into such assignments as effectually as if the assignment in terms stated as a condition precedent that it should be void and ineffective until after the payment in full of all debts due by the assignor to subcontractors, supply men and laborers for the construction of the building, and in its legal effect is a direction to the owner thus to distribute the fund.

In *Floyd, Tr. v. Harding*, 28 Gratt. (68 Va.) 405, Staples, J., said this: "While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed. The authorities in support of this principle are almost innumerable. It is unnecessary to cite them, as they may be found in Dwarris on Statutes, 181-4, 209; 2, 204-5, 208."

These recent cases are to the same effect: *Shenandoah Lime Co. v. Governor*, 115 Va. 870, 80 S. E. 753, Ann. Cas. 1915 C, 973; *Kain v. Ashworth*, 119 Va. 605, 89 S. E. 857; *Saville v. Va. Ry. & Power Co.*, 114 Va. 444, 76 S. E. 954; *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, Ann. Cas. 1917 B, 1168; *United States v. Lexington, etc., Elevator Co.*, 232 U. S. 409, 34 Sup. Ct. 337, 58 L. Ed. 662, L. R. A. 1915 B, 774.

In Lile's Notes on Statutes, p. 24, it is said: "All rules are, therefore, subservient to the legislative intent; and when this is clear from the language used, rules of interpretation give way—the maxim being that it is not allowable to interpret that which has no need of interpretation. Furthermore, this intention is to be gathered from the

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words used unless a literal interpretation would lead to a manifest absurdity."

Counsel for the bank fully recognize this rule but argue that to construe the words of this statute in accordance with their literal meaning does lead to confusion and manifest absurdity. We do not think it necessary to discuss the several remote possibilities which are suggested, but which clearly do not result in this case from a literal interpretation of the statute. This suit is itself a sufficient answer to every such suggestion. It completely protects the owner of the building, and fully illustrates its effectiveness as a remedy for every interested party. All that the owner has to do in case such an assignment is made is to follow the example of this owner—pay the money into court and convene the claimants of the fund, and relieve himself of all responsibility in connection therewith. If he does not know the claimants of the fund, then he can take advantage of the statute (section 3230 of the Code) which authorizes complainants who think that there may be persons who are interested in the subject whose names are unknown, to make them parties to the suit by the general description of "parties unknown," and on proper affidavit to have them convened by order of publication.

The statute, section 2482-a, was enacted twenty years ago, it has received from learned commentators the same construction which has been here put upon it, and no such dire results as counsel fear have ensued. While its wisdom has been doubted by some, until now, so far as we are informed, its meaning has not been questioned.

We have no doubt whatever as to the proper construction of this statute, nor of the power of the legislature to enact it.

The trial court erred in decreeing that the assignment to the bank had priority. The decree should have required

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the parties to prove their claims and then the fund should have been distributed, first to the payment of the debts due to the appellants, and then the surplus should have been applied to the partial payment of the debt due the bank.

The decrees will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Decrees Reversed.

Syllabus.

Staunton.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. RIELEY.

September 20, 1917.

1. CARRIERS—*Tickets and Fares—Time Limit.*—In general, it may be said that a time limit on a railroad ticket may be, at the same time, both a contract of carriage between a passenger and carrier, and a regulation of the carrier for the conduct of its business.
2. CARRIERS—*Tickets and Fares—Time Limit.*—Primarily, the function of a ticket is to serve as evidence as between the conductor of the carrier's train and the passenger of the latter's right to transportation. When a ticket is serving such function, the time limit contained on it (whether on its face, or back, or within its folds, is immaterial) is a regulation of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its validity as a contract between a passenger and carrier.
3. CARRIERS—*Tickets and Fares—Time Limit—Case at Bar.*—Where, as in the instant case, a train of the carrier runs daily, from the place of departure to the place of destination of the passenger, and there is no statutory regulation on the subject, or regulation of somebody having authority in the premises, such as the State Corporation Commission, to the contrary, a time limit in the following language: "Good continuous passage beginning date of sale only on train scheduled to stop at destination, otherwise passenger transfer to local train," printed on the face of a regular first-class ticket, is a reasonable regulation and valid.
4. CARRIERS—*Tickets and Fares—Ticket as Contract.*—A railroad ticket being delivered to the passenger to be used for its primary function to serve as evidence, as between the conductor and the passenger, and being accepted and so used by him, may also afford evidence of the contract of carriage between the passenger and carrier to the extent that such contract is expressed by the ticket, if the passenger knowingly assents to the matters so expressed.

Statement.

5. **CARRIERS—Tickets and Fares—Usages and Customs.**—Custom and usage may have an important bearing on whether stipulations on a ticket may, in particular cases, constitute a contract, as well as at the same time serve in part the primary function of a ticket.
6. **CARRIERS—Tickets and Fares—Ticket as Contract.**—Where there exists evidence of actual knowledge on the part of the passenger of the stipulations on the ticket, and acquiescence therein, there can be no question that the ticket evidences a contract as well as serves its primary function as evidence between the conductor and the passenger.
7. **CARRIERS OF PASSENGERS—Baggage—Limitation of Liability.**—The liability of a carrier of baggage is, at common law, that of an insurer, and the carrier's liability with respect to the baggage of the passenger can only be limited by express contract between the passenger and carrier. It cannot be done by notice or any *ex parte* regulation of the carrier, however reasonable. And an *ex parte* stipulation on a ticket limiting the common-law liability of a carrier with respect to the baggage of the passenger, is no evidence of a contract in the absence of all evidence of any knowledge or assent to it by the passenger, at the time the ticket was purchased.
8. **APPEAL AND ERROR—Judgment by Appellate Court.**—Where it is evident that a new trial will not avail the plaintiff anything, the Supreme Court of Appeals will enter such judgment as the court below should have entered in favor of the defendant.

Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

STATEMENT OF THE CASE AND FACTS

In this action of trespass on the case the defendant in error was plaintiff and the plaintiff in error was defendant in the court below. They will be hereinafter referred to as plaintiff and defendant.

The action was brought to recover damages for the alleged wrongful ejection of the plaintiff from a passenger train of the defendant by the conductor of the latter.

Statement.

THE FACTS.

The facts of the case appear from the agreed statement between the parties, which is as follows:

"For the purpose of saving time and costs, the parties hereto have agreed, and do hereby agree, that the following statements are facts, and are all the facts which either party hereto will rely upon at the trial of this case:

"(1) That the defendant is and was a common carrier of passengers, as alleged in the declaration, from the town of Norton, in Wise county, Virginia, to and beyond the town of Appalachia, in said county, and that its line of road between the said towns is entirely within said county.

"(2) That the plaintiff, on October 15, 1915, purchased from the defendant's ticket agent at Blackwood, which is a station on defendant's line between said towns of Norton and Appalachia, a regular ticket from Blackwood to Appalachia, with the intention of making the trip on defendant's train that day, but did not make the trip. On the following evening he went aboard defendant's regular passenger train at Norton, to which place he had gone in the meantime, with the purpose of going on said train to Appalachia. He had purchased at Norton one of defendant's regular tickets from Norton to Blackwood, which he gave to the train conductor on leaving Norton. Immediately after the train left Blackwood he tendered to the conductor the ticket from Blackwood to Appalachia, which he had purchased from the defendant on the day before, as above set forth, which ticket is hereto attached, marked "Exhibit Ticket." This ticket the conductor refused to accept, giving as his reason for so doing that his instructions from the defendant required him to refuse to accept such tickets, except when tendered on the date of sale, and he demanded of the plaintiff other fare. Plaintiff insisted upon his right to be carried on said ticket, and refused to pay other fare, whereupon the conductor

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ejected him from the train at a point about one mile west of Blackwood. The ejection was without force and no abusive language was used, by the conductor. The conductor stopped the train and the plaintiff left the train under protest.

"(3) That the said ticket was one of the regular tickets used by the defendant in its regular, daily passenger business, and that the plaintiff paid the defendant therefor at its regular and legally established rate, the amount being \$0.18.

"(4) That the said train upon which the plaintiff was being carried at the time of his ejection was scheduled to stop at said town of Appalachia.

"(5) That after the train left Norton on the occasion mentioned and before it reached Blackwood and at the time the conductor took up plaintiff's ticket from Norton to Blackwood plaintiff also handed the conductor his said ticket from Blackwood to Appalachia, but the conductor then and there returned to him the last named ticket, telling him that it was out of date and that he could not honor it, but that plaintiff would have to get another ticket at Blackwood, or pay cash fare from Blackwood to Appalachia, or get off at Blackwood. After the train started from Blackwood plaintiff again tendered said ticket to the conductor and refused to pay cash fare. At the time plaintiff purchased said ticket on October 15, 1915, he did not notice and had no knowledge of the conditions printed on said ticket with reference to the limitation of the time for its use and said condition was not brought to his notice by the defendant or any one else until the conductor called his attention to the ticket and the date thereon at the time and place above stated.

"(6) That the amount of damage sustained by the plaintiff by reason of said ejection is the sum of \$350.00.

"(7) It is further agreed in this case that the whole matter of law and of fact may be heard and determined and

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judgment given by the court without the intervention of a jury and if the court find for the plaintiff it shall enter judgment for the said sum of \$350.00 and costs."

"EXHIBIT TICKET."

"Louisville & Nashville R. R. Co.,
Blackwood, Va., to Appalachia, Va.

c	"Good continuous passage beginning date of sale	2
v	only on train scheduled to stop at destination, other-	3
2	wise passenger transfer to local train. Baggage lia-	9
8	bility limited \$100 adult's ticket, \$50 child's ticket,	6
6	unless greater value declared and excess rate paid,	3
	according to tariff's regulations.	

R. D. PUSEY,
Gen. Pass. Agt.

"Endorsed on back as follows:

L. & N. R. R.

Oct. 15, '15.

Blackwood, Va."

There was a judgment of the trial court in favor of the plaintiff for \$350.00 with interest thereon from April 4, 1917, until paid and costs, and the defendant assigns error.

Irvine & Stuart, for the plaintiff in error.

C. R. McCorkle, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court:

The assignments of error in the petition in this case raise a single question for our determination, namely:

1. Was the time limit, "Good (for) continuous passage beginning date of sale only," printed on the face of the regular first class ticket in the instant case, valid?

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It will be observed that the question of the validity of the time limit referred to, arises in this case upon the inquiry whether the defendant is liable in damages for the conduct of its conductor in ejecting plaintiff from its train. That is to say, the action is not upon a contract of carriage but in tort for the conduct of the carrier through its conductor in ejecting the alleged passenger.

In the instant case this distinction could not have had any practical effect on the result of the case if it had been an action for breach of contract, but it has a material bearing upon and brings into view more clearly, the principle involved, as we shall presently see.

It will be noted that in the case before us the plaintiff had no actual knowledge or notice of the time limit in question until after he bought and received the ticket. It is contended for plaintiff that his rights in the premises are contractual—fixed by the contract of carriage between carrier and passenger; and that, therefore, the time limit, although printed on the face of the ticket, could not form a part of such a contract or bind the plaintiff, unless he had actual notice of it, and acquiesced therein, at the time the contract of carriage was made.

On the other hand it is contended for the defendant that the time limit in question was not a matter of contract between the passenger and carrier, but a regulation merely of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its invalidity as a contract between a passenger and carrier.

Upon these different positions the authorities are in considerable seeming, and some real, conflict.

In general, it may be said that a time limit on a railroad ticket may be, at the same time, both a contract of carriage between a passenger and carrier, and a regulation of the

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carrier for the conduct of its business. Elliott on Railroads, sec. 1593, 1594, 1598, and the numerous authorities cited. As sometimes expressed, it may at the same time be "both a receipt and a contract." *Richmond, F. & P. R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620.

Primarily, the function of a ticket is to serve as evidence, as between the conductor of the carrier's train and the passenger, of the latter's right to transportation. When a ticket is serving such function, the time limit contained on it (whether on its face, or back or within its folds, is immaterial) is a regulation of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its validity as a contract between a passenger and carrier. Elliott on Railroads, *supra*, and authorities there cited, among the latter *Peabody v. Oregon, etc., Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823, and note; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Bradshaw v. So. Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, and note. See also to the same effect, *Va. & S. S. R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899, and authorities cited on this subject; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617. When the question of the validity of a stipulation appearing on a railroad ticket with respect to the passenger's right of transportation arises, in an action against the carrier in tort for ejection of the passenger by the conductor of the carrier, on principle, and in accordance with the great weight of authority, the ticket is regarded as serving its primary function aforesaid, and the ticket is considered as the only evidence as between the conductor and passenger of the latter's right of transportation. *Va. & S. W. R. Co. v. Hill*, *supra*; Elliott on Railroads, sec. 1594 and authorities cited, among them the opinion of Taft, J. in

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Poulin v. Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800; *Frederick v. Marquette, etc., Co.*, *supra*, and note of Judge Freeman, 41 Am. Dec. at p. 475. Where, as, in the instant case, a train of the carrier runs daily, from the place of departure to the place of destination of the passenger, and there is no statutory regulation on the subject, or regulation of some body having authority in the premises, such as the State Corporation Commission, to the contrary, such a time limit as in the instant case is held by all the authorities to be a reasonable regulation. *Ellicott v. Railroads*, sec. 1598 and authorities cited.

We consider the foregoing considerations upon principle and the authorities referred to, decisive of the instant case in favor of the defendant.

It is true, as above noted, that a railroad ticket being delivered to the passenger to be used for its primary function aforesaid, and being accepted and so used by him, may also afford evidence of the contract of carriage between the passenger and carrier to the extent that such contract is expressed by the ticket, if the passenger knowingly assents to the matters so expressed. The very fact that the passenger knows the primary function aforesaid of the ticket and that he takes it to be used by him to serve such function, and so uses it, in the minds of some courts implies an assent on the part of the passenger to the stipulations on the ticket with respect to his rights of transportation (an implied meeting of the minds of the contracting parties being held to exist in such cases), and hence the ticket is held to evidence a contract between the passenger and carrier to the extent of such stipulations. *Grogan v. C. & O. Ry. Co.*, 39 W. Va. 415, 19 S. E. 563; *Freeman v. Atchison R. Co.*, 71 Kan. 237, 80 Pac. 592, 6 Ann. Cas. 118; and numerous like cases. Custom and usage may also have an important bearing on whether such stipulations on a ticket may, in particular cases, constitute a contract as aforesaid, as well

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the same time serve in part the primary function of a ticket. 12 Cyc. p. 1058. In other cases, there exists evidence of actual knowledge on the part of the passenger of the stipulations on the ticket, and acquiescence therein, in such cases there can be no question that the ticket evidences a contract as aforesaid, as well as serves its primary function aforesaid. *Trezona v. Chicago, etc., R. Co.*, 107 Ill. 2, 77 N. W. 486, 43 L. R. A. 136, and numerous like cases. There are also classes of cases of special reduced fares, tickets, mileage books, and the like, where there is an express contract between the passenger and carrier. In the latter class of cases referred to above in this paragraph, naturally the courts discuss the subject of the stipulations aforesaid on the ticket from the standpoint of a contract. There are also cases where the conductor of the carrier himself makes the stipulation aforesaid contained on the ticket, as where a passenger holds a ticket sold him by the carrier which stipulates on its face that he has the right of transportation to a station named thereon, and the conductor refuses to stop the train at such station. *R. F. & P. Co. v. Rieley*, 79 Va. 130, 52 Am. Rep. 620. In such cases the question is very naturally and properly referred to as evidencing the contract between the carrier and the passenger. There is nothing in such classes of cases in conflict with the question as to the primary function of a ticket by the great weight of authority aforesaid and as to this being the function which the ticket and the time limitation on it serves in the case of the class of the instant case. In the former classes of cases their facts render it unnecessary for the question now under consideration to arise. It is doubtless true, however, that the failure of the courts in some of the cases referred to, to advert to the true principle involved, resting on the distinction as to the primary function of a railroad ticket aforesaid, has produced considerable apparent conflict among the authorities not in truth existing.

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There are, however, a few cases where the conflict in the authorities really exists, such as those of *L. & N. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; *Norman v. So. Ry. Co.*, 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809; *Dagnall v. So. Ry. Co.*, 69 S. C. 110, 48 S. E. 97, and *Norman v. E. C. Ry. Co.*, 161 N. C. 330, 77 S. E. 345, Ann. Cas. 1914 D, 917, which hold that the time limitation on a railroad ticket is a matter of contract and not a matter of regulation of the carrier for the conduct of its business; and further, that the assent of the passenger to such a stipulation on a ticket will not be implied from his acceptance and use of the ticket, but actual notice of such stipulation must be shown to have been received by the passenger at the time he bought the ticket to render the stipulation valid. But these cases are, as aforesaid, against the great weight of authority and not in accord with what we conceive to be the true principle involved, as aforesaid, and hence we cannot follow them.

The case of *Wilson v. C. & O. Ry. Co.*, 62 Va. (21 Gratt. 654), is cited and urged upon our attention as controlling authority over the instant case. That case, however, involved the validity of a stipulation on the ticket limiting the common law duty and liability of the carrier with respect to the baggage of the passenger. This could be done only by express contract between the passenger and carrier. It could not be done by notice or any *ex parte* regulation of the carrier however reasonable. Hence, the existence of a contract was necessary in that case to sustain the validity of the stipulation on the ticket, and this court properly held that the *ex parte* stipulation was no evidence of a contract in the absence of all evidence of any knowledge or assent to it by the passenger, at the time the ticket was purchased. The liability of a carrier of baggage is, at common law, that of an insurer. The liability of a carrier of passengers is not that of an insurer. The same rules as to liability do not

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apply to both. *Central R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673. It is not deemed necessary to develop here the further distinctions involved. It is deemed sufficient to say that for the reasons mentioned and indicated the baggage liability cases are not authority on the question involved in the instant case.

For the foregoing reasons we find that there was error in the judgment complained of and the case must be set aside and annulled; and since it is evident that a new trial would not avail the plaintiff anything, this court will enter such judgment as the court below should have entered in favor of the defendant.

Reversed.

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LYNCHBURG FOUNDRY COMPANY V. DALTON.

September 20, 1917.

1. **APPEAL AND ERROR—Pleadings—Demurrer to the Evidence—Record.**—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid.
2. **DEMURRER TO THE EVIDENCE—Inconsistencies in the Evidence.**—Where the testimony of some of the plaintiff's witnesses was not altogether consistent with the testimony of the plaintiff himself, upon a demurrer to the evidence, these inconsistencies must be resolved in favor of the plaintiff, as the jury might have properly so found.
3. **MASTER AND SERVANT—Injury to Servant—Duty of Master—Rules for Conduct of Business.**—Where machinery is of a very simple character and the manner of its use open and obvious to the most casual observer, there is no need for the master to publish general rules for the government of the business.
4. **MASTER AND SERVANT—Injury to Servant—Obedience to Orders—Contributory Negligence.**—The primary duty of the servant is obedience to the orders of the master, and if, when in discharge of that duty, he is injured in consequence of such obedience, he may recover of the master unless the danger is so manifest that a reasonably prudent man would not have encountered it. But obedience to the master's orders will not excuse the servant's negligence in the execution of the orders.
5. **MASTER AND SERVANT—Injury to Servant—Duty of Servant.**—It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernable by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself.

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6. MASTER AND SERVANT—*Injury to Servant—Duty of Master to Warn Servant.*—The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment.
7. FELLOW SERVANTS—*Who Are.*—Employees of a foundry engaged in loading iron pipe upon a railroad car are fellow servants, and if one of them is injured through the negligence of the other, he cannot recover from the master.
8. FELLOW SERVANTS—*Vice-Principal.*—The duty of giving suitable special orders necessary to the safety of the service is enumerated as one of the non-assignable duties of the master. Any servant to whom that duty is delegated is, while engaged in its performance, a vice-principal.
9. MASTER AND SERVANT—*Injury to Servant—Duty to Give Warning—Questions of Law and Fact.*—Where the alleged cause of danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, the question of whether he should have been warned is one of law for the court.
10. MASTER AND SERVANT—*Injury to Servant—Contributory Negligence of Servant—Case at Bar.*—Plaintiff was employed by the defendant foundry company, when not engaged in the shop, to load all kind of pipe upon cars. Pipe were loaded by means of an engine, with a boom or crane. Extending out, and attached thereto, was a block, and to the end of the block was fastened a hook. Separate and apart from the boom was a ring to which two chains were permanently fastened. To the other end of each chain was fastened a large hook. On the morning of the injury plaintiff was engaged as "ground" man in loading a "special" pipe, for which only one chain was needed and he had been instructed to hang the unused chain in the ring. This he failed to do, as he found both hooks already hung in the ring, and while plaintiff, in obedience to orders, with both hands on the pipe, was shoving it into the door of the car, as he had been directed by the company to do, the unused chain became detached and fell, striking one of his hands and causing the injury for which the action was brought. Plaintiff knew that if the extra chain was not properly hooked up, and came in contact with the top of the car it would probably be knocked out and the chain would fall.

Held: That it was plaintiff's duty to hang up the extra chain and so hang it as not to cause injury to himself. This duty

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he neglected to perform, and his resulting injury is to be attributed to his own negligence and not to the negligence of his master.

Error to a judgment of the Corporation Court of the city of Radford, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The plaintiff in error, hereinafter called the Foundry Company, was engaged in the manufacture and sale of iron pipe, and employed the defendant in error, who was nineteen years of age at the time of the injury hereinafter mentioned, to "load all kind of pipe" when not engaged in the shop. At the time of the injury he had been in the employment of the Foundry Company continuously for four or five months, and about one-fourth of this time was devoted to loading "special" pipe, such as was being loaded when he was injured, but all the "specials" he had loaded had been in open cars, and he had never before loaded a "special" in a box car, nor had he ever seen one loaded in a box car. He had, however, "loaded some long pipe in the box cars." The joints or elbows were known as "specials," the other pipes were simply designated long pipe. He had loaded "specials" about a week in open cars, and long pipe for three weeks, some of the latter being loaded in box cars.

Pipe were loaded by means of an engine, with a boom or crane. Extending out, and attached thereto, was a block, and to the end of the block was fastened a hook. Separately and apart from the boom was a ring to which two chains were permanently fastened; each of the chains being about eight feet long, and weighing about 75 pounds. To the other end of each chain was fastened a large hook. In loading all straight pipe and also in loading heavy "specials" both chains were used. The ring to which the two

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chains were fastened was placed over the hook at the end of the boom. In loading straight pipe, the two chains hanging down were fastened one in each end of the pipe, but in loading small "specials," such as were being loaded at the time of the injury, only one chain was used and the other was sometimes hooked back in the ring at the other end of the chain, and sometimes it was left swinging down, and at other times it was dropped loose into the end of the "special" which was being loaded. Dalton had been instructed to hang the hooks up in the ring, but on the morning of the accident he found both hooks already hung up in the ring, and he simply "taken one out" to use in loading in the "specials." When the point of the hook was turned from the car in which the "specials" were to be loaded there was no danger of its being knocked off if the chain came in contact with the car, but when the point was turned towards the car such danger did exist, though during the four or five months Dalton had worked there he had never seen the chains fall, nor heard of their falling, and the manager of the Foundry Company, who had been in its employment for ten years and on the yard several hours every day, had never seen the chains fall, nor heard of their falling. Another employee of the company, testifying for Dalton, says the chains had fallen once or twice during his three years of service, and still another testifies that the chains occasionally fell, but neither of them claims to have notified the Foundry Company, nor is there any evidence that the company ever had such notice, or any knowledge of the falling of the chains. Dalton, however, knew that if the extra chain was not properly hooked up, and came in contact with the top of the car it would probably be knocked out and the chain would fall. On this point he testified as follows:

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"Q. Mr. Dalton, you know, as a matter of fact, that you have a ring with a hook in it and something come down and catches that hook it is going to fall out? A. If the crane jerks it out and hits the car of course it is.

"Q. I am speaking of the hook in the ring, if it hits something, it is going to knock it off? A. Certainly, if it hits a car and comes in that way, it is going to knock it off.

"Q. That is a matter of common knowledge, if it hits on the side? A. If it comes in like that and hits it like that (indicating). That is the first time I ever seen it.

"Q. If they hit the ring that way, it is going to bounce out? A. I guess it would."

On the morning of the injury Dalton was engaged "ground" man in loading a "special," that is, a twenty inch pipe about six feet long and in the shape of an elbow, in a box car, and had taken down one chain and had fastened it to the pipe, and the other chain was left by him hanging in the ring at the end of the boom. He was instructed by the company to hang the unused chain in the ring in loading "specials." After the pipe had been raised by the crane and carried to the car, Dalton, with both hands on the pipe, was shoving it into the door as he had been directed by the company to do, when the chain became detached and fell, striking one of his hands, and mashing one finger and injuring another, and for this injury the action was brought.

Caskie & Caskie, for the plaintiff in error.

H. C. Tyler, for the defendant in error.

BURKS, J. (after making the foregoing statement) delivered the opinion of the court.

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We are met at the outset of this case with a motion to dismiss because the record is not certified as required by an act of assembly approved March 21, 1916, (Acts, 1916, ch. 406, p. 708) abolishing bills of exception. It is sufficient to say that the act has no application to the pleadings which are *per se* a part of the record, and that a demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *C. & O. Ry. Co. v. Sparrow*, 98 Va. 630, 37 S. E. 302.

After the plaintiff had introduced his evidence, the Foundry Company introduced a single witness to prove an uncontroverted fact, and then demurred to the evidence. There was no real conflict between the evidence of the plaintiff and that of the defendant, but the testimony of some of the plaintiff's witnesses was not altogether consistent with the testimony of the plaintiff himself. These inconsistencies, however, must be resolved in favor of the plaintiff, as the jury might have properly so found. *Bass v. Norfolk Ry. Co.*, 100 Va. 1, 40 S. E. 100; *Ches. & O. Ry. Co. v. Pierce*, 103 Va. 99, 48 S. E. 534; *Burks Pl. & Pr.*, p. 95, and cases cited.

The plaintiff's position, both in the trial court and in this court is stated by his counsel thus: "While it is true the plaintiff is young, it is not contended that his failure to discover the latent danger was due to immature years, but to his lack of experience in loading pipe into a box car, and that there was nothing in the condition surrounding the injury to him that would have caused a man of mature years to suspect the chain would fall unless he knew that the boom would strike the car."

Argument of counsel has taken a very wide range, and they have shown a commendable zeal in the citation of authorities, but it is not deemed necessary to go so extensively into the law of master and servant to arrive at a proper conclusion. It is not claimed that the machinery

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was complicated, nor that it was in any way defective, that it was inadequate for the purpose. The claim of plaintiff is that he should have been notified how to hook up the chain not in use, and the danger in not so hooking it, or else that a boom with only one chain attached should have been provided for that kind of work; that he should have been warned of the danger of the hook being knocked off by coming in contact with the top of the car when loading into a box car, and not instructed to "keep his hands from the pipe."

The machinery was of a very simple character and the manner of its use open and obvious to the most casual observer. There was no need, therefore, to publish general rules for the government of the business. *Moore Lumber Co. v. Richardson*, 95 Va. 326, 28 S. E. 334, 64 Am. St. R. 735.

Much stress is laid upon the statement of the plaintiff that he was instructed to keep his hand on the pipe while loading "specials" in a box car, so as to guide it into the door, and that the plaintiff was simply obeying orders. Doubt is cast upon this statement by the testimony of some of the plaintiff's witnesses, that they were cautioned "every time we changed jobs to be careful," and to "keep out from everything," and that it was unreasonable to suppose that the plaintiff could have worked there four or five months without hearing of such caution. Assuming, however, that the jury might have found in accordance with the plaintiff's testimony, we still do not think he was entitled to recover. Undoubtedly, the primary duty of the servant is obedience to the orders of the master, and if, when in discharge of that duty, he is injured in consequence of such obedience, he may recover of the master unless the danger is so manifest that a reasonably prudent man would not have encountered it. *Millboro Lumber Co. v. Donaldson*, 120 Va., 150 90 S. E. 618; *U. S. Leather Co. v. Showalter*, 113 Va. 479, 74 S. E. 400, and cases cited.

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The exception, however, in cases of open and obvious danger is as well established as the rule itself. *Norfolk & W. Ry. Co. v. Ward*, 90 Va. 687, 19 S. E. 849, 24 L. R. A. 17, 44 Am. St. Rep. 945; *Norfolk & W. Ry. Co. v. Ampey*, 103 Va. 108, 25 S. E. 226; *Robinson v. Dininny*, 96 Va. 41, 20 S. E. 442; *Mason v. Post*, 105 Va. 494, 54 S. E. 311, 11 L. R. A. (N. S.) 1038; *Clinchfield Coal Corp. v. Cruise*, 117 Va. 645, 86 S. E. 135; *Reid v. Medley*, 118 Va. 462, 87 S. E. 616.

When it is said, in stating the rule above mentioned, that the master is liable "unless the danger is so manifest that a reasonably prudent man would not encounter it," it must be understood as meaning that a reasonably prudent man would not *under the circumstances of the case*, or that a reasonably prudent man, possessed of such knowledge as the servant had, or was properly chargeable with, would not have encountered it. Moreover, in the application of the rule, the servant himself must not have been guilty of negligence proximately contributing to his injury which rendered unavailing the master's orders. Obedience to the master's orders will not excuse negligence in the execution of the orders.

In the instant case, it was the duty of the plaintiff, as the "ground man," to hang up the extra chain and so to hang it as not to cause injury to himself. The fact that the chains would come in contact with the box car when loading into it, and that they *must* come in contact with it, would seem to be a plain proposition of common sense, but it must have been actually demonstrated to the plaintiff during the time he was loading straight pipe into the box car. These were physical facts open to his observation. He knew, therefore, before he was injured that the chains would come in contact with the car, and it was manifest that if the hook was turned to the car and came in contact with it, it was liable to be knocked out of the ring and al-

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low the chain to fall. He admits that he knew that the hook would be knocked out if it came in contact with the car while the point of the hook was turned in that direction. It was his duty, therefore, so to hook the chain that it could not fall. This duty he neglected to perform, and his resulting injury is to be attributed to his own negligence and not to the negligence of the Foundry Company which furnished him a safe appliance, and a safe place in which to work, which was only rendered unsafe by the negligent manner in which he discharged the duty assigned him. He would have suffered no injury in obeying the orders of the superintendent "to keep his hands on the pipe" if he had properly hooked up the extra chain. The order of the master was based upon the assumption that he would properly discharge the duty that had been imposed upon him.

The place and the appliance furnished by the master were reasonably safe in the first instance, and the master's order subjected the plaintiff to no hidden or unexpected danger. The danger of doing the work in the manner in which it was done was open and obvious to even a casual observer. But the plaintiff was no casual observer. He had loaded straight pipe into box cars before, and although both chains were then used, he must have seen, and certainly ought to have seen, that the chains necessarily came in contact with the car.

"It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernable by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to be set him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere." *Russell Creek Coal Co. v. Wells*, 9

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Va. 416, 31 S. E. 614; *Bowles v. Soapstone Co.*, 115 Va. 701, 80 S. E. 799; *Va. Iron, Coal & Coke Co. v. Asbury*, 117 Va. 683, 86 S. E. 148.

"The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment." *Fields v. Virginian Ry. Co.*, 114 Va. 558, 77 S. E. 501; *Reid v. Medley*, *supra*.

The case comes within the rule above stated, that obedience to the master's orders does not excuse the servant for encountering an open and obvious danger.

If the plaintiff would not have been injured, notwithstanding his negligence, but for the negligence of the operator in lowering the boom too far, thereby causing the hook to strike the top of the car and drop the chain, there could still be no recovery, as the operator of the boom was a fellow-servant of the plaintiff, and the risk of his negligence was assumed by the plaintiff. *Northern Pac. R. Co. v. Hamblly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Norfolk & W. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342.

Some question has been raised as to whether or not the superintendent of the Foundry Company in giving orders to Dalton and others as to the proper method of doing the work, was a vice-principal or a fellow-servant. The duty of giving suitable special orders necessary to the safety of the service is enumerated as one of the non-assignable duties of the master. *Huffcut Agency*, sec. 276. Any servant to whom that duty is delegated is, while engaged in its performance, a vice-principal. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Norfolk & W. R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791.

Several cases decided by this court have been cited by counsel for the defendant in error in support of the propo-

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sition that "the question whether the servant should have been warned has always been for the jury on the evidence." *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868; *C. & O. Ry. Co. v. Meadows*, 119 Va. 33, 89 S. E. 244; *Smith v. N. & P. Traction Co.*, 109 Va. 453, 63 S. E. 1005; *N. & W. Ry. Co. v. Cheatwood*, 103 Va. 365, 49 S. E. 489. An examination of these cases will show that none of them were cases of open and obvious dangers of which the servant knew, or in the exercise of ordinary care ought to have known. In the case at bar not only was the danger open and obvious, but the servant admits that he knew that the hook would bound out if it struck the car when hung up in a given way, and it was his duty to hang it up. Where the alleged cause of danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, the question is one of law for the court. *Clinchfield Coal Corp. v. Cruise*, 117 Va. 645, 86 S. E. 135. But whether the question be one for the court or the jury, in no view of the case could the jury have properly found a verdict for the plaintiff.

For these reasons the judgment of the trial court must be reversed, and this court proceeding to enter such judgment as the trial court should have entered, it is ordered that the demurrer to the evidence of the plaintiff in error be sustained, and that the action of the defendant in error be dismissed, with costs to the plaintiff in error.

Reversed.

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MARKS AND OTHERS V. GORIA BROTHERS.

September 20, 1917.

Absent, Burks, J.

1. LANDLORD AND TENANT—*Tenancy from Year to Year—Termination Upon Notice at Option of Either Landlord or Tenant.*—

At common law it was an inseparable and invariable incident of a tenancy from year to year, that it could be terminated at the end of any yearly period, either by the landlord or tenant, by giving six months prior notice of the purpose to so terminate the tenancy. By statute (section 2785, Code of 1904), it is provided that "A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year, for three months if it be for land within * * * (a) city or town, of his intention to terminate the same." In the case of a tenancy from year to year, therefore, formerly at common law and now by statute, both the landlord and tenant had and have the option to terminate the tenancy at the end of any yearly period by giving notice as aforesaid.

LANDLORD AND TENANT—*Notice to Quit.*—By statute (section 2785, Code of 1904), in case of a tenancy from year to year, notice of intention to terminate the tenancy is required, but other tenancies are left to be governed in this regard by the lease or contract between the parties, and notice to quit is either required or not required as may be provided for or not provided for in the agreement between the parties.

LANDLORD AND TENANT—*Tenancy from Year to Year—Creation by Express Contract—Option to Terminate.*—A tenancy from year to year may be created by the express terms of a lease or contract, as well as by implication of law from the holding over of the premises by a tenant with the assent of the landlord, after the expiration of a definite term of a former tenancy; but when created by the express terms of a lease or contract the distinguishing characteristic that it may be terminated by either party upon due notice to the other, is never absent.

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4. **LANDLORD AND TENANT—*Tenancy from Year to Year—Case of Bar.***—A lease not under seal demised the premises for a term of one year, "at a certain monthly rental for and during the term of this lease as hereinafter expressed." The lease further provided that: "It is distinctly understood and agreed between the parties hereto that the lessee shall have the option of leasing the said premises from year to year for the additional term of eight years, upon the terms, stipulations, provisions and requirements above enumerated." Before the expiration of the first term of one year, an assignment of the lease was made to the defendants and they entered into possession of the premises thereunder. Before the expiration of the said one year term the defendants gave the original lessor notice under the lease "that they would accept the option right therein provided for and continue in possession of the building." Accordingly, the defendants held over beyond the one year term into the second year. During the second year an addendum, not under seal, was added to the lease, by which it was agreed that the defendants should have the right of renting the premises from year to year, as provided for in the lease, and that the option of leasing the same from year to year should be construed to mean that the rent from year to year should continue until the defendants should give notice to terminate the lease prior to any yearly period therein mentioned.
Held: That as the lease in the instant case did not leave the option to terminate on notice with both landlord and tenant but only with the tenant, it did not create a tenancy from year to year.
5. **LANDLORD AND TENANT—*Lease—Construction.***—The term provided for in the lease, as set out in headnote 4, is for one year, and after that, "from year to year for the additional term of eight years," subject to a provision in the lease itself by which the lessors give the lessees the option to decide, in effect, whether the term shall be for one year only or for a second term of one year, or a third like term, or a fourth, or fifth, or sixth, or seventh, or eighth, or ninth like term. That is to say, the lease is for successive periods of one year each with the option to the lessees to continue for the respective periods.
6. **LANDLORD AND TENANT—*Entry by Tenant—Notice.***—The relationship of landlord and tenant does not exist unless and until the tenant enters into possession. Where a term or successive terms of fixed duration is or are demised by a lease, each term ends at a time certain, to-wit, the end of the time fixed

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by the lease for the duration thereof. Until or unless the tenant enters or holds over possession into one of such terms, the relationship of landlord and tenant as to such term never commences to exist. If he has entered into possession for a preceding term under the lease, and vacates the premises at or before the end of that term, the relationship of landlord and tenant ceases at the end of such term, without any notice, either from landlord or tenant, being needed to terminate it, unless the parties contract for a notice to be given.

7. LANDLORD AND TENANT—*Lease for Successive Terms—Notice to Quit.*—Where a lease demises successive terms to be held at the option of the tenant, and the tenant holds over possession from one term into another, his succeeding possession is held under the lease, for the succeeding term demised by the lease; and if that term is for a time certain, to-wit, for one year, as in the instant case, it is an estate for years, and will end at the end of such year without notice from or to him to quit, unless the lease or contract itself provides for such notice to be given. If the lease or contract provides for a notice to be given, what notice must be given, and when, depends alone upon such contract provision on the subject.

8. LANDLORD AND TENANT—*Holding Over—Tenancy from Year to Year.*—If a tenant should hold over possession of premises from one term demised by a lease into another not demised by the lease, or if demised, is so demised that the duration of such succeeding term is left uncertain by the lease, in this, that both the landlord and tenant have an option of terminating it at the end of any year, upon notice, not provided for by the lease but by law, that would create in the tenant holding over a tenancy from year to year.

9. LANDLORD AND TENANT—*Notice of Termination of Tenancy.*—A lease for successive years provided that it should continue until the tenant should give a notice to terminate prior to any yearly period therein mentioned.

Held: That upon notice by the tenant being given prior to the yearly period mentioned in the lease, the tenancy, which was before that for a definite term of one year, unless another year was added thereto at the option of the lessee, was not succeeded by another term for one year, but ended at the termination of the yearly period in which such notice was given. In effect, the provision is that the notice shall be sufficient if given at any time, so that it be prior to the beginning of the yearly period mentioned therein.

10. LANDLORD AND TENANT—*Construction of Lease—Grantee Favored.*—In all cases of uncertainty the tenant is most

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avored by law, because the landlord, having the power of providing expressly in his own favor, has neglected to do so and also upon the general principle that every man's grant is to be taken most strongly against himself.

11. LANDLORD AND TENANT—*Statute of Frauds—Tenancy from Year to Year*.—Where a tenant enters under a lease void under the statute of frauds because not under seal and for a longer term than five years (section 2413, Code of 1904), the tenancy is one from year to year. But in the instant case, where the lease was for succeeding terms of one year each, renewable at the option of the lessee, this rule does not apply.
12. LANDLORD AND TENANT—*Notice—Case at Bar*.—Where a lease for successive terms of one year provides for its termination by a notice to the landlord prior to any yearly period, notice for a reasonable time is not necessary. Had the lease not provided when such notice might be given, but merely required notice, a notice for a reasonable length of time before the beginning of the succeeding yearly term would have been necessary. But the provision in the instant case is, in effect, that the notice shall be sufficient if given at any time, so that it be prior to the beginning of a yearly period.

Error to a judgment of the Law and Chancery Court of the city of Roanoke, in a case of an attachment for rent. Judgment for plaintiffs. Defendants assign error.

Reversed.

STATEMENT OF THE CASE AND FACTS.

This is a case of an attachment for rent sued out by the defendants in error (plaintiff in the court below, herein designated plaintiffs), against the plaintiffs in error (defendants in the court below and hereinafter designated defendants).

The rent sought to be recovered is for the year from November 1, 1915, to November 1, 1916.

The defendants entered into possession of the premises in question, located in the city of Roanoke, under a lease which was not under seal.

The lease in question was made originally to another

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and the original lessee's rights under it were assigned latter to the defendants; it was also made by a dis- lessor from plaintiffs and the original lessor's rights it were assigned to the plaintiffs.

lease was dated October 25, 1911, and demised the premises for a term of one year, commencing the first of November, 1911, "at a certain monthly rental" "for during the term of this lease as hereinafter expressed." ther provided that "The above letting is upon the fol- g terms and conditions," among which, in the 8th e of the lease, was the following provision:

is distinctly understood and agreed between the par- hereto that the lessee shall have the option of leasing aid premises from year to year for the additional term ght years, upon the terms, stipulations, provisions and rements above enumerated."

ne of the "terms, stipulations, provisions and require- s" referred to, are material in this case, except those e mentioned.

e original lessee entered into possession under said November 1, 1911. Before the expiration of the said term of one year, the said assignment of the lease was e to the defendants and they entered into possession e premises thereunder.

fore the expiration of the said one year term the de- ants gave the original lessor notice under the lease t they would accept the optional right therein provided nd continue in possession of the building." As a mat- f fact no provision for any notice is contained in the nal lease, but this is immaterial as no question is raised e instant case with respect to the election of the de- ants to continue the lease beyond the first term of one for the second, third and fourth one-year terms.

ccordingly the defendants held over beyond the one- term into the second year. On January 1, 1913, dur-

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ing such second year, while the original lessor was still the owner of the premises an addendum was added to said lease (the addendum also not being under seal), which was written on the back thereof and subscribed to by both said original lessor and the defendants, by which it was agreed *inter alia*, that the defendants should have "the right of renting same (said premises) from year to year as provided for in clause 8 thereof, and that the option of leasing the same from year to year shall be construed to mean that the rent from year to year shall continue until the said Marks Company shall give a notice to terminate same prior to any yearly period therein mentioned."

On October 12, 1915, the leased building was so far destroyed by fire that the defendants who were then occupying it under said lease, and had been paying rent monthly in accordance therewith, could not continue to occupy it.

On October 22, 1915, defendants gave plaintiffs notice in writing that "pursuant to the terms of the contract of lease" aforesaid "by which" they had been "tenants of said building" they would on "the 25th day of October, 1915" vacate said premises and surrender the possession thereof to the plaintiffs."

On October 25, 1915, a further notice in writing, to the same effect, was given by defendants to the plaintiffs and on that day the former vacated the premises and surrendered possession thereof to the plaintiffs.

Thereupon contractors employed by plaintiffs entered upon the premises and commenced the repair work rendered necessary by the fire which was completed on November 11, 1915. On the latter date plaintiffs gave notice in writing to defendants that the repairs to the said building on said premises had been completed, but defendants did not re-occupy same, and this action was instituted for rent as aforesaid.

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The action was instituted upon the contract contained in the lease and not upon any implied promise of defendant to pay the rent sued for.

There was a trial by jury which resulted in a verdict for the plaintiffs.

The trial court instructed the jury that under the lease introduced in evidence, "the defendants were tenants from year to year and that such a tenancy may be terminated by giving the landlord three months' notice in writing prior to the expiration of the current year, and if the jury shall believe from the evidence that such notice was not given in this case by the defendants, they shall find for the plaintiffs."

The assignments of error are based on the giving of said instruction, the refusal of instructions asked for by the defendants to the effect that the lease aforesaid created an estate for years and not a tenancy from year to year, and the refusal of the court to set aside the said verdict as contrary to the law and the evidence.

A. B. Hurt and *M. P. Burks, Jr.*, for the plaintiffs in error.

Johnston & Izard and *Carlton Penn*, for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

1. The sole question raised by the assignments of error in this case is whether the tenancy of the defendant under the lease above mentioned was a tenancy from year to year?

A tenancy from year to year has a well defined meaning in the law. At common law it was an inseparable and invariable incident of a tenancy from year to year, that it

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could be terminated at the end of any yearly period, either by the landlord or tenant, by giving six months' prior notice of the purpose to so terminate the tenancy.

By statute with us (section 2785, Code of Va.) it is provided that "A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year, for three months if it be for land within * * * (a) city or town, of his intention to terminate the same.

In the case of a tenancy from year to year, therefore, formerly at common law and now by statute, both the landlord and tenant had and have the option to terminate the tenancy at the end of any yearly period by giving notice as aforesaid.

The statute by its express terms requires the notice therein mentioned to be given only in cases of a tenancy from year to year. Other tenancies are left to be governed in this regard by the lease or contract between the parties, and notice to quit is either required or not required as may be provided for or not provided for in the agreement between the parties.

It is true that a tenancy from year to year may be created by the express terms of a lease or contract, as well as by implication of law from the holding over of the premises by a tenant with the assent of the landlord, after the expiration of a definite term of a former tenancy; but when created by the express terms of a lease or contract the distinguishing characteristic that it may be terminated, as aforesaid, by either party upon due notice to the other, is never absent. If the lease in the instant case had left the option with both landlord and tenant, it would have created a tenancy from year to year. Without this mutuality of right, or option, of terminating it by notice, a tenancy from year to year cannot exist. We cannot, therefore, regard the tenancy in the instant case as a tenancy from year to year.

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indeed, when we look to the lease in the instant case we find that the term provided for therein is for one year, and thereafter that, "from year to year for the additional term of eight years," subject to a provision in the lease itself by which the lessors give the lessees the option to decide, in each year, whether the term shall be for one year only or for a second term of one year, or a third like term, or a fourth, or fifth, or sixth, or seventh, or eighth, or ninth like term. That is to say, the lease is for successive periods of one year each with the option to the lessees to continue for the respective periods. The lease expresses the will of the lessors. That is not left optional with them, to be expressed by the notice to quit which the law requires as incident to a tenancy from year to year. The lessees are by the lease given the option to express their will—not by the notice which the law requires as incident to a tenancy from year to year, but by their silence and holding over to thus express their will affirmatively, and by giving a certain notice, within a certain time, provided for in the lease, to thus express their will negatively. Upon the exercise of such option, the minds of the parties meet, and an express contract is made between the lessors and lessees under the lease itself, and the new term becomes an assured term for a time certain, to-wit, for the time fixed by the lease. The circumstance that the lease will be construed as a demise of the preceding term only, unless and until the lessees, by the affirmative exercise of their option, enter upon a succeeding term (*James v. Kibler's Adm'r*, 94 Va. 166, 26 S. E. 417; *De v. Dixon*, 9 East 15), does not at all affect the further conclusion that when such an option is exercised and the succeeding term is entered upon by the lessees, the new term thereupon demised by the lease and held under it, as aforesaid.

The rule is elementary that the relationship of landlord and tenant does not exist unless and until the tenant enters

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into possession. Where a term or successive terms of fixed duration is or are demised by a lease, each term ends at a time certain, to-wit, the end of the time fixed by the lease for the duration thereof. Until or unless the tenant enters or holds over possession into one of such terms, the relationship of landlord and tenant as to such term never commences to exist. If he has entered into possession under a preceding term under the lease, and vacates the premises at or before the end of that term, the relationship of landlord and tenant ceases at the end of such term, without notice, either from landlord or tenant, being needed to terminate it, unless the parties contract for a notice to be given. Where the lease demises successive terms to be held at the option of the tenant, and the tenant holds over possession from one term into another, his succeeding possession is held under the lease, for the succeeding term demised by the lease; and if that term is for a time certain, to-wit, one year, as in the instant case, it is an estate for years and will end at the end of such year without notice from or to him to quit, unless the lease or contract itself provides for such notice to be given. If the lease or contract provides for a notice to be given, what notice must be given and when, depends alone upon such contract provision on the subject. The latter is the instant case. If a tenant should hold over possession of premises from one term demised by a lease into another not demised by the lease or if demised, is so demised that the duration of such succeeding term is left uncertain by the lease, in this, both the landlord and tenant have an option of terminating it at the end of any year, upon notice, not provided for by the lease but by law, that would create in the tenant a holding over a tenancy from year to year to which the statute above referred to would apply. But the last named is

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the case before us. (See as to estates for years and tenancy from year to year, 1 Taylor's Landlord and Tenant, sec. 54, 24 Cyc. 958).

In the former case, it will be observed, the landlord (the plaintiffs in the instant case) could not terminate the lease at the end of any year before the expiration of all of the terms provided for therein, by giving notice. The option given the tenant (the defendants in the instant case) to terminate the lease could not operate to give the plaintiffs a like option (*Doe v. Dixon, supra*); and hence does not change the estate demised by the lease from an estate for years (from successive one-year terms) into a modified state at will, which is a tenancy from year to year.

Therefore in the instant case, the option or duty to give or not to give the notice on which depended the result of whether the lease would or would not extend to the fifth succeeding year, to-wit, the year from November 1, 1915, to November 1, 1916, did not result from the existence of a tenancy from year to year during the preceding occupancy of the premises by defendants, nor from the statute (sec. 785, Code of Virginia), but was derived and resulted from the express provision on the subject in the lease, providing for a notice to be given by the defendants. That is to say, in the instant case this is a matter resting solely in contract between the parties and the rights of defendants under it are to be determined solely by the construction of the terms of such contract. *Id certem est, quod certem eddi potest*; and by the very terms of the contract in the instant case, upon the notice by defendants being given, as it was, "prior to (a) * * * yearly period therein mentioned," i. e., prior to November 1, 1915, the tenancy, which was before that for a definite term of one year ending November 1, 1915, unless another year was added thereto by and at the option of the defendants, was not succeeded by another term for one year, but ended at the termination of

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that year. The lessors contracted that this should be the case. They cannot therefore, complain of it. If they had not provided for a notice to evidence the negative exercise of their option by the defendants, the lease would have been terminated at the end of any current year by the expiration or vacation of the premises by defendants prior thereto. Had notice being provided by the addendum to the lease for a longer time, they might have provided how many days prior to the expiration or beginning of any yearly period such notice should be given. If they had provided that such notice should be given a certain number of days or five days or any other time prior to the beginning of any yearly period, plainly it would not be contended that the statute and not the contract would govern the case. With such a provision it would be manifest that the substance of the case rested solely in contract and was not governed by the statute. Can it be less so when the provision in the contract does not stipulate that the notice shall be given any particular length of time before the beginning of any yearly period, but states, in effect, that it shall be sufficient if given *any time*, so that it be *prior* to the beginning of any yearly period? This being a subject of contract, the lessors cannot complain of the power of providing expressly a longer definite time for notice. They neglected to do so. As said by Taylor, J., in *Landlord and Tenant* in section 81, on the subject of leasehold certainties in terms of leases left optional thereby, "And in all cases of uncertainty the tenant is most favored by the law, because the landlord, having the power of providing for the notice expressly in his own favor, has neglected to do so; and upon the general principle that every man's grant is to be taken most strongly against himself." To same effect in *Cyc.* 961.

To further illustrate: If instead of the option given in the lease in the instant case to the defendants to terminate the lease at the end of any yearly period by notice given in the aforesaid, the lease had given them an option to terminate

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lease by purchase of the premises (24 Cyc. 1021-3-4-5), notice to be given "prior to any yearly period therein mentioned"; could there be any doubt that an election to purchase and notice of it given at any time prior to the ending of such a period, though but one day or any interval of time prior thereto, would have been sufficient and would have terminated the lease and ended the lessors' right to rent? That is to say, the notice of the exercise of the option required by the lease would have been a matter of contract solely and defendants' rights under it would have been governed by the terms of the contract on the subject. (24 Cyc. 990-1024.) Can it be less so because the lease does not require a purchase or any other thing to be done except the giving of the notice?

The case of *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 2d 101, is cited and the following quotations, from the syllabus and from the opinion in that case, are urged in support of the case of the plaintiffs.

It is said in such syllabus:

"Holding over and continuing to pay the same rent by the tenant, under a lease for twelve months, "with the privilege of renewal for the term of five years, if the said second lease, so desires, at the expiration of the said first year, without a new lease executed, and without notice to the landlord before or at the expiration of the first term of his lease or election to renew said lease for the additional five years, renders him tenant from year to year."

the text it is said:

"Reason, as well as the weight of judicial authority justifies us in holding, as the circuit court did, that simply holding over after the expiration of a lease containing a bare covenant to renew, and paying rent according to the terms of the old lease, does not amount to an election to renew, but constitutes the tenant a tenant from month to month

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or year to year, depending on the terms of the lease as to rent or rental periods."

It will be found from an examination of that case, however, that the court draws the distinction found in the case between leases containing covenants "to renew" and leases containing the use of the word "renewed" as distinguished from leases containing other words, and expressly placed its decision upon the ground that it construed the lease involved there to be merely a covenant to execute a new lease, and not a demise by the lease in evidence.

There are some nice distinctions in the authorities on this subject, which we need not enter into here, as in the instant case the lease was clearly a demise of the premises which became operative immediately upon the exercise of the option conferred (24 Cyc. 1008). Hence, the West Virginia case cited and relied on, as aforesaid, is not an authority affecting the instant case.

The well settled rule, that where a tenant enters under a lease void under the statute of frauds because not under seal and for a longer term than five years (section 24 Code of Va.), the tenancy is one from year to year, is urged upon our attention. But as we have seen the lease in the instant case was not for a term exceeding five years, being in fact by reason of the option aforesaid for succeeding terms of one year each, hence the instant case does not fall within such rule. Section 5 Bac. Abr. (Leases) p. 625 and *James v. Kibler's Adm'r.*, *supra*, for principle involved.

With respect to the time of the notice provided for in the lease in the instant case, this should be said: Had the lease not provided when such notice might be given, but required a notice, a notice for a reasonable length of time before the beginning of the succeeding yearly term would have been necessary. But since the lease expressly provides when the notice may be given, that concludes the

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question with respect to the time of the notice, and the reasonable time doctrine or rule has no application.

For the foregoing reasons we are constrained to hold that the court below was in error in instructing the jury that the tenancy in the instant case was a tenancy from year to year and that the three months' notice mentioned in the instruction above quoted should have been given by defendants. The judgment complained of must, therefore, be reversed and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

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MATNEY AND OTHERS V. YATES AND OTHERS.

September 20, 1917.

1. **APPEAL AND ERROR—Amendment—Record—Objections in Case Below.**—An order was entered at the August term of the lower court, reciting that an amended bill was filed by leave of court, and while the record indicated that it was not in fact filed until September following, this discrepancy, though directly adverted to, in the brief of counsel, was immaterial as the amended bill was recognized and passed upon by the court at a still later term, and no objection based upon the time of filing, and no question as to the identity of the amendment, appeared anywhere in the record.
2. **APPEAL AND ERROR—Final Judgments and Decrees.**—A decree sustained the demurrer of one defendant to a bill and adjudged ordered and decreed that the bill of complainants be remanded to rules to be matured as to the other defendants. At the next term, an amended bill was filed by leave of court, to which the defendant, whose demurrer had been sustained, objected on the ground that the decree was a final decree, and ended the case as to him, so that he was not affected by the leave given to file the amendment.
Held: That the objection was without merit.
3. **LOST INSTRUMENTS AND RECORDS—Bill in Equity to Set Up Lost Deed.**—A bill attempting to set up a lost deed alleged that the parties who were connected with, and who knew anything about, the transaction, were dead, and that complainants were unable to prove that the deed was in fact made.
Held: That the court could not entertain a case, which, in the outset, the complainants admitted they would be unable to support by proof when the burden of proof was upon them to do so.
4. **JUDGMENTS AND DECREES—Vacation.**—Section 3293 of the Code of 1904, giving the court "control over all proceedings in the office during the preceding vacation," has no application to vacation decrees entered pursuant to provisions of section

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3427 of the Code of 1904, providing for the submission of motions, actions at law and chancery causes for decision in vacation.

5. **REVIEW**—*Petition for Rehearing*.—An erroneous petition for rehearing, where the court by entering a final decree in vacation had lost control of the cause, may be treated as a bill of review, where it plainly sought to correct an error of law apparent upon the face of the record, and was, in substance, a bill of review, which is the appropriate proceeding for the correction of a final decree by the court in which it has been rendered.

6. **MULTIFARIOUSNESS**.—Where a bill had a single, ultimate object in view, namely, to perfect the record title to land, which complainants claimed they owned in fee simple, and sought to attain this purpose, first, by establishing a lost deed, and secondly, by obtaining release deeds from other claimants, there was nothing inconsistent in attempting to accomplish this single purpose in either of the two ways indicated in the bill, and therefore the bill was not multifarious.

7. **TRUSTS**—*Establishment—Interest of Complainant*.—A bill that alleges that complainants are claiming the ownership of a tract of land as successors in title of the original owners, whom they have succeeded in possession of the land, shows a substantial and sufficient interest in the land in controversy, in a suit to establish a constructive trust in defendant for the benefit of complainants.

8. **PRINCIPAL AND AGENT**—*Constructive Trusts*.—An agent may not purchase land in his own name for the benefit of his principal and then refuse to convey the same in accordance with his contract, but in such case will be held as a constructive trustee.

9. **FRAUDS, STATUTE OF**—*Resulting Trusts—Agency*.—Where a principal, having no interest in the land to be purchased, makes a verbal contract with an agent to buy for him, and the latter purchases in his own name and with his own funds and then repudiates the agency and refuses to convey to the principal, the question whether the contract is within the statute of frauds and not enforceable against the agent, depends upon whether the contract in its essence and effect was one of agency, or was it one for the purchase of real estate. If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof.

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10. **FRAUDS, STATUTE OF—*Resulting Trusts—Agency.***—Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money.
11. **CONSTRUCTIVE TRUSTS—*Agent Taking Title in His Own Name.***—Where it is sought to establish that an agent to purchase land is a constructive trustee of his principal, the relationship of principal and agent should be established by clear and convincing proof.
12. **MULTIFARIOUSNESS—*Multiplicity of Suits.***—It is the policy of the law to avoid a multiplicity of suits, and to reject the objection for multifariousness where there is no liability to injustice.
13. **MULTIFARIOUSNESS—*Demurrer Sustained as to One Branch of the Case.***—Where the trial court sustained a demurrer and entertained an amendment which showed that the complainants were bound to fail in their proof upon one branch of the case, it was error to dismiss the bill for multifariousness. The court ought to have treated as surplusage the allegations relating to this branch of the case or ought to have reserved to complainants the right to amend by striking out these allegations.
14. **JUDGMENTS AND DECREES—*Vacation.***—Final decrees in vacation ought to guard against cutting off the opportunity for amendment.

Appeal from a decree of the Circuit Court of Buchanan county. Decree for defendant. Complainant's appeal.

Reversed.

The opinion states the case.

Geo. W. St. Clair and J. H. Stinson, for the appellants.

Chas. & Daugherty, for the appellees.

Kelly, J., delivered the opinion of the court.

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The appellants, John H. Matney and J. H. Stinson, filed an original bill, the particular allegations of which, so far as necessary for this statement, may be briefly and substantially set out as follows:

That Walter Matney and Richard Yates acquired jointly and in fee simple by grant from the Commonwealth two certain tracts of land in Buchanan county, containing respectively 241 and 166 acres; that subsequently, in the year 1879, these patentees made an oral partition whereby Walter Matney was allotted the 241 acres and Richard Yates the 166 acres, and the parties took possession of their respective tracts, which they, and those claiming under them, have ever since held; that Matney and Yates made deeds to each other, confirming the partition, which were duly executed, delivered and recorded, but the original deeds and the records thereof were destroyed by fire in the year 1885; that complainants under numerous mesne conveyances acquired title to the Walter Matney 241-acre tract (less a portion of the coal and minerals); that the names of all the heirs of Walter Matney and Richard Yates and all the facts, transactions and conveyances having any effect, real or apparent, upon the title to both tracts of land were as particularly set out in the bill; that because complainants' evidence of title had been destroyed by fire they had entered into a contract with Richard Yates, Jr. (more fully set out in a subsequent paragraph of this opinion), whereby the said Yates, Jr., agreed to obtain releases for them from all the heirs of Richard Yates, Sr.; that Yates, Jr., proceeded to procure releases in his own name, and thereafter violated his contract, and committed a breach of trust by continuing to hold the title in his own name, refusing to make any conveyance to the complainants.

The bill prayed that a commissioner be appointed to make deeds to the present owners in lieu of the deeds that had been destroyed, and, further, that Richard Yates, Jr., be

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required to execute to the present owners of the 241 acre a release deed for all the right, title and interest acquired by him from the heirs of Richard Yates, Sr. There was also the usual prayer for general relief.

To this bill the appellee, Richard Yates, demurred, stating in writing forty grounds for his demurrer, and the circuit court, on April 29, 1914, entered a decree which concluded as follows:

"The court is of opinion that the grounds of demurrer are well taken, doth sustain said demurrer, and adjudges order and decree that the bill of complainants be remanded to rules to be matured as to the C. L. Ritter Lumber Company, Inc., and the Yellow Poplar Lumber Company, Inc."

At the next term of the court, in August, 1914, an order was entered reciting that an amended bill was filed by leave of court, and while the record indicates that it was not in fact filed until September following, this discrepancy though indirectly adverted to in the brief of counsel for defendant Yates, is immaterial, as the amended bill is recognized and passed upon by the court at a still later term, and no objection based upon the time of filing, and no question as to the identity of the amendment, appears anywhere in the record. An objection, however, was made to the amended bill by Richard Yates on the ground that the decree of April 29, 1914, quoted above, was a final decree, and ended the case as to him, so that he was not affected by the leave given to file the amendment. The court did not pass upon that objection, but a mere reading of the language of the decree shows that the objection was wholly without merit. Yates then demurred to the amended bill, and by consent of parties by counsel, the court took the cause for decision in vacation.

The amended bill did not differ very materially from the original, except in the important qualification made in the allegation relating to the deeds confirming the oral parti-

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tion between Walter Matney and Richard Yates. The amended allegation upon this point was as follows: "Your orators have been informed, and are advised, that the said Richard Yates made a deed conveying all his right, title and interest in and to the said 241-acre tract of land to Walter Matney, but of this your orators cannot be positive, as all the parties who were connected with, and who knew anything about the transaction, are dead, and your orators are unable to prove that this deed was in fact made." This allegation, in our opinion, eliminates entirely that branch of the case which attempts to set up the lost deed, and renders unnecessary any discussion or consideration of the multitudinous questions raised by the demurrers to the original and amended bill, regarding the sufficiency of the allegations looking to such relief. Whether the bills are in other respects sufficient to meet the requirements of section 2361 of the Code, with reference to which they seem to have been framed, we need not stop to inquire, since it is readily apparent that the court could not entertain a case which in the outset the complainants admitted they would be unable to support by proof when the burden was upon them to do so. This weakness in the amended bill was the subject of one of the thirteen grounds of demurrer thereto, and while we think the circuit court committed error in the final disposition of the cause, it was clearly right in refusing to grant relief upon the theory of a lost deed.

On April 18, 1915, the court, proceeding to hear the cause in vacation, entered a decree to the following effect:

"The court doth sustain the demurrer of Richard Yates, and hereby dismisses the original and amended bills as to him, the court being of opinion that the facts as stated in the two bills do not constitute and set up a resulting trust, or any trust, as to Richard Yates, and is also of opinion that the bill is multifarious, and inasmuch as the said bill

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is multifarious, the court doth dismiss this suit, and direct that the same be left from the docket, and that the defendant, Richard Yates, recover his costs."

At the succeeding term of the court, beginning in July 1915, the appellants, Matney and Stinson, filed what they called a petition to rehear the cause, and with their petition exhibited a second amended bill, which sought to meet the view of the court that the bill was multifarious by eliminating entirely all allegations except such as were deemed necessary by the complainants to make out a case against Richard Yates as a constructive trustee, and entitle them to a decree requiring him to convey to them such title as he had obtained from the heirs of Richard Yates. The record contains a recital, apparently a copy of some endorsement or entry made by the clerk in the course of the proceedings in the lower court, to the effect that this petition for rehearing and the amended bill accompanying same, were filed in open court and by leave of court. No objection appears to have been made to them at that time, and a decree was entered reciting the filing of the same, and granting Richard Yates, upon his motion, sixty days' time within which to file a demurrer. Pursuant to this leave he filed a demurrer to the petition for rehearing, and also to the second amended bill. One ground of demurrer which was urged against both the petition and the amended bill was that they both came too late, the court having, as contended, lost control over the cause by entering a final decree in vacation on the 18th day of May, 1915, and that the only recourse, if any, open to the complainants was by application to this court for an appeal. The contention of the complainants in this respect, on the other hand, was that as the decree of May 18, 1915, was a vacation decree, the court had control over it until after the next term, by virtue of the provision of section 3293 of the Code, giving the court "control over all proceedings in the office during

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the preceding vacation." We are of opinion that this section has no application to vacation decrees entered, as this one was, pursuant to provisions of section 3427 of the Code. Such decrees are not within the contemplation of section 3293. We are further of opinion, however, that the court had the power to, and did in effect, treat the petition as a bill of review. It plainly sought to correct an error of law apparent upon the face of the record, and was, in substance, a bill of review, which is the appropriate proceeding for the correction of a final decree by the court in which it has been rendered.

On the 16th day of November, 1916, the court having considered the petition for rehearing, the second amended bill, and the objections and demurrers thereto, for reasons stated in a written opinion filed in the cause, "adjudged and ordered that the rehearing prayed for in said petition be, and the same is by this decree, denied, and it is further adjudged and ordered that the demurrer to said second amended bill be, and the same is by this decree, sustained, and this cause is ordered stricken from the docket at complainant's cost."

The chief assignments of error are that the court was wrong in holding (1) that the original and amended bills were multifarious, and (2) that no case for relief had been stated against Richard Yates, Jr. We think both of these assignments must be sustained. The original and amended bill clearly has a single, ultimate object in view, namely, to perfect the record title to the land which the appellants claimed they owned in fee simple. This purpose might have been accomplished in either of two ways: First, by the establishment of the partition deed between Matney and Yates, confirming the oral partition; second, by obtaining release deeds from all the heirs of Richard Yates. There was nothing inconsistent in attempting to accomplish this single purpose in either of the two ways which were indi-

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cated in the bill. However, we have seen that the allegation of the first amended bill as to the lost deed was sufficient as to cut the complainants off from any relief on that branch of the case, and it need not be further considered. The sole question before us, as we view this record, is whether the complainants' pleading made out a case against Richard Yates, entitling them to a decree compelling him to convey to them such title as he acquired from the heirs of Richard Yates, Sr. In order to properly dispose of the question it becomes necessary to state now somewhat more fully than has heretofore appeared, the contract which the complainants allege they had with Richard Yates, Jr., and the action thereunder. The substance of that matter, as alleged in all the bills, is that Yates, Jr., was one of the heirs of Richard Yates, Sr.; that he offered to see the other heirs and obtain releases from these heirs; that complainants employed him (verbally) in this capacity, upon his representation to them that, being one of the heirs, he could and would do the work for less money than some other persons could do it; that he was to receive certain compensation for his services; that each of the heirs at law were to receive a small consideration for executing the deed; that after accepting this employment, he secured the execution of a deed to himself from the heirs at law of Richard Yates, Sr., representing to some of them as an inducement for signing the deed that he was doing the work for the complainants, and would thereafter execute a deed to them for the title; that after obtaining a deed from the Yates heirs he refused to make conveyance to complainants, although they offered to pay him for his services, and to reimburse him in full for all the cost and expense which he had incurred in connection with the matter.

The principal defenses to this branch of the case asserted by Richard Yates, Jr., are: First, that none of the bills sufficiently alleged the interest of the complainants in the land

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and second, that the complainants are undertaking to enforce a contract made between them and him which is not in writing and, therefore, invalid. We do not think either of these defenses is good. The bills all allege that the complainants are claiming the ownership of the 241-acre tract, and that as successors in title of the original owners, they have succeeded to a possession of the land which has continued ever since the oral partition in 1879. This shows a very substantial, and for the purposes of this case an entirely sufficient, interest in the land in controversy, and brings the case easily within the principle of constructive trusts as invoked by the complainants.

In a case where the principal, having no interest in the land to be purchased, makes a verbal contract with an agent to buy for him, and the latter purchases in his own name and with his own funds and then repudiates the agency and refuses to convey to the principal, the question whether the contract is within the statute of frauds and not enforceable against the agent, is one upon which there is a very great conflict of authority.

That such a contract is not within the statute and may be proved by parol evidence, see, among many other authorities, the following: 29 Am. & Eng. Enc. L. (2d ed.), p. 892; 15 *Id.* 1187, note 2; 20 Cyc. 234; 1 Mechem on Agency (2d ed.), section 1194, and note 18; *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145; *Parker v. Catron*, 120 Ky. 145, 85 S. W. 740, 117 Am. St. Rep. 575, 577; *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 107 N. W. 384, 5 L. R. A. (N. S.) 112, 12 Ann. Cas. 800; note to *McCoy v. McCoy*, 102 Am. St. Rep. 237.

For the contrary and apparently the more prevalent view, see, among many others, the following authorities: 1 Mechem on Agency (2d ed.), section 1194, note 17; 15 Am. & Eng. Enc. L. (2d ed.), p. 1187, note 1; *Nash v. Jones*, 41

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W. Va. 769, 24 S. E. 593; *Henderson v. Henrie*, 68 W. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628, Ann. Cas. 1 B, 318.

These citations, as to both sides of the question, may be multiplied indefinitely.

The Virginia cases (*Wellford v. Chancellor*, *Jackson Pleasanton, Va. Pocahontas C. Co. v. Lambert*, cited *infra*) while distinctly holding that an agent may not purchase land in his own name for the benefit of his principal and then refuse to convey the same in accordance with his contract, but in such case will be held as a constructive trust, can hardly be said to settle conclusively the question as to the character of proof necessary to establish the agency, since in none of those cases was the statute of frauds relied upon as a defense. The cases of *Henderson v. Hudson*, 1 Munf. (15 Va.) 510; *Walker v. Herring*, 21 Gratt. Va.) 678, 8 Am. Rep. 616, and *Burgwyn v. Jones*, 113 511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1 E, 564, relating to the purchase of lands by one party under a parol contract that another is to have an interest therein, and holding that such contracts are within the statute of frauds, must be regarded as tending, in principle, to support the view that a constructive trust in real estate cannot be established upon a parol contract of agency. The exact question, however, was not passed upon in any of those cases.

In *Yerby v. Grigsby*, 9 Leigh (36 Va.) 387, it was held that a person owning real estate might by parol authorize another to make a contract for the sale, and that under such authority the owner would be bound by a contract made in writing by the agent. It would seem, upon principle, that the converse of the proposition must be equally true.

Some of the authorities make a distinction between cases in which the principal is seeking to assert against the

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parties his claim to the land purchased by the agent and cases in which the claim is, as here, directly against the agent, permitting parol evidence of the agency in the former and rejecting it in the latter class of cases. Again, very many of the authorities recognize a distinction between verbal contracts in which the agent agrees to buy in his own name and reconvey to the principal and those in which he is employed to buy and take the title in the first instance directly to the principal, upholding the latter and rejecting the former.

This confusion and conflict has arisen, as we think, from a failure to apply to every case the test of the very simple question, was the contract in its essence and effect one of agency, or was it one for the purchase of real estate? If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof. This distinguishing principle is pointed out more or less clearly in a number of the cases cited above. To repeat at length the discussion thereof contained in even a very few of the leading cases would unduly and unreasonably prolong this opinion, and we content ourselves with the following brief extracts:

In *Rose v. Hayden*, 35 Kan. 106, 118, 10 Pac. 554, 563, 57 Am. Rep. 145, 155, in which the opinion goes quite fully into the authorities on both sides of the question, the court said: "The controlling question in this case is not whether the principal advanced the purchase-money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal and in abuse of the confidence reposed in him by his principal,

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can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot."

In *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 10 N. W. 384, 5 L. R. A. (N. S.) 112, 12 Ann. Cas. 800, a case in which, as in *Rose v. Hayden*, an agent employed under a parol contract purchased the land in his own name with his own money, the court said: "It seems to us that in the defendants' argument, as well as in the authorities cited in support of it, there is a failure to distinguish between those cases where an estate or interest in land, or some trust or power over or concerning lands, is one of the considerations of the contract, and is acquired as a direct result thereof, and those where such estate, interest, trust, or power is not such consideration, and is not acquired as a direct result of the contract, but which arises as a remote result of the contract and from an abuse of the relation thereby established. It is not claimed by the plaintiff that at the time he made his contract with Hayward he there acquired any title, legal or equitable, to the land, or that any trust or power over or concerning the land was thereby created. On the contrary, the most he claims for that contract is that it created between him and Hayward the relation of principal and agent. The land itself, or any interest or trust or power over and concerning the land, was no part of the consideration moving from either party to the other. The consideration which the plaintiff agreed to pay was the value of Hayward's service, and the consideration moving from Hayward was the service he undertook to render as the plaintiff's agent. That an oral contract creating an agency, although for the purchase or sale of real estate, is valid is clearly established by the authorities."

If this conclusion is correct, and we cannot doubt that it is, then there can be no difficulty at all about applying to the instant case the doctrine of constructive trusts. The

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relationship of principal and agent should of course in all such cases be established by clear and convincing proof. In the present case the agency is admitted by the demurrer and must at this stage of the cause be regarded as a fact. The fact being established, the Virginia authorities plainly fix the status of Richard Yates, Jr., as that of a constructive trustee for Matney and Stinson, charged with the duty of conveying to them such title as he acquired from the other Yates heirs, upon their compliance as offered in the bill with the terms of the agency contract. See *Wellford v. Chancellor*, 5 Gratt. (46 Va.) 39; *Jackson v. Pleasanton*, 95 Va. 654, 657, 29 S. E. 680; *Va. Pocahontas C. Co. v. Lambert*, 107 Va. 368, 58 S. E. 561, 122 Am. St. Rep. 860, 13 Ann. Cas. 277; 1 Min. Real Prop., section 482.

There is even less difficulty in holding the agent as a trustee in the instant case than in the ordinary case of principal and agent, because, as we have seen, the appellants already had possession of the land under a claim of title which appears to have been recognized by Richard Yates, Jr., and which he used as an inducement with some of the heirs while holding himself out to them as the agent of the appellants. In so far as he held himself out in this capacity, the case is peculiarly within the influence of the decision of this court in *Va. Poca. Co. v. Lambert*, *supra*, in which Judge Buchanan, delivering the opinion said: "While the evidence is conflicting as to the representations made by the appellee in obtaining the conveyance from Mrs. Beavers and Cline and wife, it clearly appears from the whole testimony and from the circumstances surrounding the transaction that he made the impression upon the grantors that he was not purchasing for himself, but for the coal company, which claimed to be the owner of the land and was in possession thereof, and that they were induced to make the conveyance because of their belief that in so conveying they were curing defects in former conveyances

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of the same land made by them. In other words, the record establishes the fact that the appellee secured the conveyance by causing his vendors to believe that it was made to cure defects in their former conveyances. Where a conveyance is procured under these circumstances, the grantee, under settled equitable principles, is held to be a mere trustee for the party really intended to be benefited by the grantor."

And as to the entire interest acquired by Yates, as well from those heirs to whom he may have made no representation of his agency as from those to whom he did, the case is within the well established and generally recognized principle stated in 15 Am. & Eng. Enc. L. (2d ed.), p. 1188, as follows:

"Where the principal has a present interest in the land and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money." See also *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229; *Id.* note p. 233; *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519; *Id.* note p. 526.

We are of opinion that each of the decrees which denied relief to complainants was erroneous. The original bill as before indicated, was not multifarious, stated a single general purpose, which might have been accomplished in either of two ways, and ought to have been entertained upon the principle that it is the policy of the law to avoid a multiplicity of suits, and to reject the objection for multifariousness where there is no liability to injustice. (*Jordan v. Liggan*, 95 Va. 616, 618, 29 S. E. 330; *Seefried v. Clarke*, 113 Va. 365, 369, 74 S. E. 204.) Having, however, sustained the demurrer and entertained an amendment

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which showed that the complainants were bound to fail in their proof upon the first branch of the case, it was again error to dismiss the bill for multifariousness, and more clearly so since its main purpose could then only be accomplished by a decree against Yates; and the court, in our opinion, ought to have overruled the demurrer as to him and treated as surplusage all the allegations relating to the lost deeds, in so far as any purpose was indicated in the amended bill to set them up (*Jordan v. Liggan, supra*, 95 Va. 619, 29 S. E. 330), or ought to have reserved to complainants in the vacation decree of May 18, 1915, the right to amend by striking out those allegations. Final decrees in vacation ought to guard against cutting off the opportunity for amendments. Not having done either of the things last above suggested, and having entertained the petition for rehearing and the amended bill at the next succeeding term, the proper course, in our opinion, would have been to grant the prayer of the petition (treating it as a bill of review) and to permit the amendment. The amendment was, indeed, permitted and the court considered the second amended bill, but sustained the demurrer and denied relief.

The decrees complained of will be reversed, the demurrers to the original and amended bills will be overruled, and the cause remanded to the lower court for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

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MATOAKA COAL CORPORATION v. CLINCH VALLEY MINING CORPORATION.

September 20, 1917.

1. CONTINUANCES—*Discretion of Trial Court—Appeal and Error*.
A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion unless plainly erroneous.
2. CONTINUANCES—*Discretion of Trial Court—Absent Witness—Case at Bar*.—A motion for a continuance by the defendant was based upon the absence of a witness largely interested in the defendant company, who had not been summoned as a witness. The case was called earlier in the term than could have been anticipated, but they had no reason to suppose that a trial would not be had during the term, and no steps had been taken to have the witness in readiness to attend. When the case was first called the witness was out of readiness, and, so far as the record disclosed, the testimony of the witness would have been largely if not wholly cumulative and quite unlikely to have affected the result.
Held: That the trial court did not abuse its discretion in refusing the continuance.
3. MINES AND MINERALS—*Lease—Forfeiture—Instructions*.—A mining lease provided for forfeiture if the lessee should cease to operate the mines for a period of three months, unless the delay was unavoidable and caused by circumstances beyond the control of the lessee. To excuse its failure to operate the mines, the lessee alleged a general strike at the mines and a mountain slide covering the tracks over which the coal had to be shipped. It appeared from the evidence that the lessee was practically bankrupt, that its plant was in poor condition, and that the few laborers who were there when the mines closed quit work because of unsatisfactory conditions, due primarily to defendant's lack of funds. The slide referred to was shown to have been of trifling consequence.

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Held: That there was neither a strike nor a slide of such a character as to excuse the lessee from the operation of the mines according to contract, and that defendant was not entitled to an instruction regarding these alleged excuses.

4. INSTRUCTIONS—*Evidence to Support*.—An instruction need not be given where the evidence in support of it is insufficient to sustain a verdict.

5. MINES AND MINERALS—*Lease—Forfeiture*.—A mining lease provided for forfeiture upon failure to operate the mines for three months.

Held: That, where the lessee had been notified that it would not be further indulged and would be expected thereafter to meet the requirements of the lease, a later notice upon its coming to the knowledge of the lessor that the mines were not being operated, that a forfeiture would be enforced if the lease was not complied with, could not be construed as extending the period during which the non-operation of the mines would not work a forfeiture.

6. MINES AND MINERALS — *Lease — Forfeiture — Construction of Lease*.—A mining lease contained a clause providing that a failure to operate the mines for three months should *ipso facto* work a forfeiture of the lease. Another clause provided that the failure of the lessee to perform any of the covenants and agreements of the lease for a period of thirty days should be deemed, at the option of the lessor, to work a forfeiture. It was contended by the lessee that the latter clause gave him the benefit of an additional thirty days before the forfeiture provided for in the first clause became effective, but it was held under familiar rules of construction that the lease must be interpreted as a whole and in such a way as to give effect to all its provisions; that the latter clause was a general forfeiture clause, applying to the many "covenants and agreements" of the lessee contained in the lease, and the former clause a specific provision covering specific situations.

7. MINES AND MINERALS—*Forfeiture of Lease—Instructions*.—In an action of ejectment by a lessor to recover mining property, the lease of which he alleged had been forfeited, an instruction that if the defendant company failed to pay the royalties when due, and such failure continued for a period of more than thirty days prior to the institution of the suit, the jury should find for the plaintiff, unless they believed "that the same was waived by the plaintiff," is not ambiguous, and liable to lead the jury to believe that it had reference to a waiver of the royalties themselves instead of a waiver of the forfeiture.

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8. **EJECTMENT—Landlord and Tenant—Distress.**—In an action of ejectment by a landlord against his tenant where the amount of the rent exceeded the value of all the personal property on the premises, the failure of an instruction to refer to the remedy by distress is immaterial.
9. **MINES AND MINERALS—Lease—Forfeiture.**—In an action to enforce the forfeiture of a mining lease, it was not error to refuse an instruction that "if the plaintiff declared a forfeiture on one ground, with knowledge of other grounds of forfeiture, it must stand or fall upon the ground declared where it appeared that plaintiff had told defendant that it intended to declare a forfeiture upon the ground of non-operation of the mines, but when the action was tried, the plaintiff was required, upon the defendant's motion, to file a bill of particulars of its claim, and in doing so it set out a large number of additional grounds, including the failure to pay royalties, all of which were negatived in a statement of grounds of defense, and the case was tried upon the issues thus defined. One of the grounds of defense was that plaintiff failed to give the defendant notice of any ground of forfeiture prior to the institution of the suit. Therefore, defendant cannot afterwards maintain that plaintiff did give notice of one distinct ground of forfeiture to the exclusion of all others.
10. **EJECTMENT—Parties to Action.**—One operating mines under contract with a lessee which gave him exclusive possession thereof for the time being, but whose possession was not exclusive of and was subordinate to the possession of the entire tract by the lessee, is not the party actually occupying the premises, as those terms are used in section 2726, Code of 1904.
11. **EJECTMENT—Parties—Section 2726 of the Code of 1904.**—Section 2726 of the Code of 1904 provides: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff may also at the discretion of the plaintiff be named defendants in the declaration." Prior to the amendment of this section by the act of February 26, 1896 (Acts 1895-6, p. 514), it directed that "the person actually occupying the premises shall be named defendant in the declaration." The purpose of the amendment seems to have been to permit the plaintiff to join with the occupant as defendants any other persons claiming title to the land; and it may be conceded that the actual occupant is always a necessary party defendant to an action of ejectment in the sense that another defendant may by time

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and proper procedure compel the plaintiff to bring the occupant before the court. The presence of the occupant, however, is not essential to the jurisdiction of the court, and if the claimant of the premises who is sued does not appropriately raise the point, and defends the action upon the merits, he is bound by the judgment.

EJECTMENT—Parties to Action—Non-Joinder of Parties—Plea in Abatement.—Where the plaintiff in actions *ex delicto* improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions *ex contractu*. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement. Consequently, defendant in ejectment under the general issue has no right to raise the question of the failure of the plaintiff to name as defendant the person actually occupying the premises.

EJECTMENT—Pleas—Section 2734, Code of 1904.—Section 2734 of the Code of 1904, restricting defendants in ejectment to the plea of the general issue, refers only to pleas in bar and does not preclude pleas in abatement.

PLEA IN ABATEMENT—Time of Filing.—A plea in abatement for non-joinder of parties, under section 3260 of the Code of 1904, cannot be received after the defendant has pleaded in bar.

Error to a judgment of the Circuit Court of Tazewell County, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The instructions given at the instance of the plaintiff are:

No. 1. The court instructs the jury that if they believe from the evidence that the defendant company ceased to mine and ship coal from the leased premises described in the deed of lease introduced in evidence in this case, from

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the 11th day of August, 1916, to or after the 12th day of November, 1916, they shall find for the plaintiff unless the jury believes that the plaintiff waived this cause of forfeiture.

No. 2. Section 12 of the lease provides as follows: "at any time during the existence of this lease the lessee or assigns or successors, shall cease for the period of twelve months to operate the mines in the manner usual and contemplated, then such failure shall *ipso facto* work a forfeiture of this lease, and thereupon all improvements upon said property shall become the property of the lessor unless the delay is unavoidable and caused by circumstances beyond the control of the lessee."

When the defendant entered into the lease, it obligated itself to work the mines on the defendant's premises according to the terms of the lease, and to provide the necessary funds for so doing. If it ceased to operate the mines for want of funds, that was not a delay that was unavoidable or caused by circumstances beyond its control.

The plaintiff had the right to stand on the letter of the lease, and to refuse defendant further indulgence for breaches of such lease; and if you find that on October 11, 1916, the plaintiff told the defendant that in the future it would stand on the strict letter of its lease, and that future indulgence would not be granted and that the defendant should not operate the mines on plaintiff's property from August 11, 1916, until November 12, 1916, you should return a verdict for the plaintiff.

No. 3. The court instructs the jury that if they believe from the evidence that the defendant company failed to pay to the plaintiff the rents or royalties due for coal mined on said defendant under the terms of the deed of lease introduced in the evidence in this case and the failure to

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he same continued for a period of more than thirty days prior to the institution of this suit then they shall find for the plaintiff, unless the jury believe the same was waived by the plaintiff.

No. 4. The defendant company acquired the lease by assignment. It took over the lease and became the owner of it, and it must be held to have had notice of all the facts disclosed and all the recitals contained in the lease, including paragraph 12, which gives the right of forfeiture for failure to operate the mines for three months, and the defendant cannot be heard to say that it did not know of such provision.

Robinson v. Crenshaw, 84 Va. 348, 356, 5 S. E. 222;
Lamar v. Hale, 79 Va. 147, 160.

The instructions given at the instance of the defendant were:

No. 1. The court instructs the jury that he who alleges a forfeiture must prove it by a preponderance of the evidence.

No. 2. The jury is further instructed that where a lessor, after knowledge of the breach of a covenant or condition for which he could enforce a forfeiture, expressly or impliedly recognized the continuance of the tenancy, he thereby waives the forfeiture for such breach and is afterwards precluded from asserting it.

No. 3. The court instructs the jury that a waiver of the forfeiture set out in the lease, or any of them, may be either express or implied; it may be by word or by acts. All that is necessary in order to constitute such a waiver is for the plaintiff, after discovering the ground of forfeiture had arisen, to continue to recognize the lease as being in existence.

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18 Amer. Eng. Encyc. of Law 382.

No. 6. The court instructs the jury that if the defendant departed from the terms of the lease for which a forfeiture is claimed with the acquiescence of the plaintiff, or if such departure on the part of the defendant was caused by conduct of the plaintiff, which reasonably induced the defendant to believe that the plaintiff did not intend to enforce a forfeiture in case of such a departure, then the plaintiff is estopped from asserting such forfeiture.

18 Amer. Eng. Ency. Law 383.

Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151.

Randol v. Scott, 110 Cal. 590, 42 Pac. 976.

No. 7. The court instructs the jury that if they believe from the evidence that the plaintiff released the defendant from the payment of royalties accrued prior to April, 1919, then the plaintiff waived its right to declare the forfeiture of the lease by reason of the failure to pay said royalties.

No. 8. The court instructs the jury that the plaintiff cannot claim a forfeiture for failure to pay royalties when it, the plaintiff, refused to accept.

No. 9. The court instructs the jury that if they believe from the evidence that the plaintiff, by its words or acts, caused the defendant to believe that it would not insist upon a forfeiture for failure of the defendant to comply with the terms and conditions of the lease, and thereby lulled the defendant into security and caused it to do or fail to do something which was contrary to its duties under the lease, and which otherwise it would have done, then such words and acts of the plaintiff was a waiver of its right to insist upon a forfeiture for such act.

No. 10. The court instructs the jury that the lease does not permit the plaintiff to claim a forfeiture for failure to work the mines according to approved methods of mod-

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ing unless the evidence shows that the question of whether or not they were being worked in approved methods was referred to arbitrators in accordance with provision seven of the lease, and that the defendant failed to carry out the findings and judgment of said arbitrators.

No. 11. The court instructs the jury that if they believe from the evidence that the defendant ceased for the period of three months to operate the mines in the manner as contemplated in the lease, still such failure did not work a forfeiture of the lease unless the delay was avoidable by the defendant and caused by circumstances within the control of the defendant. If such delay was unavoidable and caused by circumstances beyond the control of the lessee, then such cessation is not a cause of forfeiture.

No. 15. The court instructs the jury that even though the lease shown in evidence provides that the failure of the lessee to operate the mines in the manner usual and therein contemplated, for the period of three months, shall *pro facto* work a forfeiture of the lease, this language means no more than that the lease shall be forfeited upon the failure to operate for the time specified upon the election of the lessor. The mere failure to work for three months does not of itself, operate to forfeit the lease.

And, after argument by counsel, the jury retired and rendered the following verdict:

"We, the jury, on the issue joined, find for the plaintiff that it recover from the defendant, who was in possession thereof at the commencement of this action, possession of the land in its declaration specified, and that it is entitled to the same in fee simple.—Henry Harrisson, Foreman."

Instructions refused defendant are:

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No. 4. The court instructs the jury that if the plaintiff declared a forfeiture on one ground with knowledge of other grounds of forfeiture, he must stand or fall upon the ground of forfeiture which he declared, and if he fails to establish his right to declare a forfeiture on such ground, then the verdict must be for the defendant.

No. 5. The court instructs the jury that even if the terms of the lease were violated in every particular, yet if the jury believe from the evidence that the defendant knew of these violations and failed to elect and declare a forfeiture on account thereof but continued to recognize the lease as in existence after such knowledge, then the plaintiff waived his right to declare a forfeiture by reason of said violation.

No. 13. The court instructs the jury that if they believe from the evidence that the operation of the mines was resumed between August 11 and November 17 because the plaintiff and defendant agreed in order to properly work the mines additional capital was necessary, and that the said defendant should, before resuming operations, procure \$10,000.00 additional capital stock, then the defendant had a reasonable time within which to raise said additional capital, and the jury in estimating the time which was to elapse before the plaintiff could declare a forfeiture under the twelfth clause of the deed of lease must deduct such reasonable time.

No. 14. The jury are instructed that under the twelfth clause of the lease shown in evidence the covenant against ceasing to operate the mines for the period of three months in the manner usual and therein contemplated, was broken until the expiration of the last hour of the last day of such three months period, during which the operation contemplated under the lease had ceased. And they

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further instructed that under the twenty-third clause of the said lease, before the lessor has the option to declare the said lease forfeited for the failure to perform any of the covenants and agreements in the lease, the breach of the covenant must continue for thirty days after such breach so that unless the jury believe from the evidence that the defendant not only ceased to operate the mines in the manner usual and contemplated in the lease, for the period of three months, but that such failure continued for the further period of thirty days after the lapse of such three months cessation of work, or in other words, that the plaintiff ceased to operate the mine for three months and thirty days, then no forfeiture was incurred and the jury must find for the defendant.

Instruction No. 16. The court instructs the jury that although the twelfth clause of the lease shown in evidence in this action provides that "if at any time during the existence of this lease the lessee, his assigns or successors shall, for the period of three months, cease to operate the mines, in the manner usual and herein contemplated, then such failure should *ipso facto* work a forfeiture of this lease"—this language only means that upon the failure of the lessee to work the mines for the period of three months in the manner usual and contemplated, then such failure shall, at the option of the lessor, work a forfeiture. And the jury is further instructed that before the Clinch Valley Coal Mining Corporation can elect to treat the lease as forfeited, for the failure of the lessee to operate the mines in the manner usual and contemplated under the lease, and before the Clinch Valley Mining Company can maintain an action of ejectment, based upon the forfeiture of the lease by the lessee for the failure to perform this condition, the said Clinch Valley Coal Mining Company must

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first demand that the lessee perform the condition. They are further instructed that unless they believe from the evidence that such demand of performance was made by the Clinch Valley Coal Mining Corporation of the Matoaka Coal Company, they must find for the defendant.

No. 18. The court instructs the jury that unless they believe from the evidence that the Matoaka Coal Corporation was actually occupying the premises set out in the declaration filed in this action, at the time of service of the declaration, and notice, then the plaintiff cannot recover in this action, and your verdict should be for the defendant.

The defendant also offered the following instruction:

No. 1. The court instructs the jury that forfeitures are not favored in law, and that he who alleges a forfeiture must prove it by a preponderance of the evidence.

But the court modified said instruction so as to read as follows: "The court instructs the jury that he who alleges a forfeiture must prove it by a preponderance of the evidence."

Error to a judgment of the Circuit Court of Tazewell county, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Affirmed.

R. Randolph Hicks and J. Powell Royall, for the plaintiff in error.

Greever, Gillespie & Devine and A. T. Seymour, for the defendant in error.

KELLY, J., delivered the opinion of the court.

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This is an action of ejectment brought by the Clinch Valley Mining Corporation against the Matoaka Coal Corporation to enforce the forfeiture of a lease of coal land and regain possession of the leased premises. These corporations will hereinafter, for convenience and brevity, be designated as plaintiff and defendant. There was a verdict and judgment for the plaintiff, and the defendant brings the case here upon a writ of error.

The plaintiff is the owner of a tract of coal land in Tazewell county, which, in July, 1913, it leased in writing to one Thomas P. Boswell for a period of thirty years. The particular provisions of this lease, so far as material, will hereinafter appear. Boswell assigned the lease at once to a corporation called the Pocahontas Mining Company, and this company shortly thereafter entered into possession of the leased premises, installed a coal mining plant thereon and continued to operate the same until the fall of 1914, when it became a bankrupt, and its affairs were taken in charge by the United States District Court for the Eastern District of Virginia, sitting as a court of bankruptcy. In the course of the proceedings in that court, the lease was sold on March 6, 1915, at public auction, and was bid in by C. M. Kaylor for the benefit of himself and certain associates. The plaintiff, the Clinch Valley Mining Corporation, was a creditor of the bankrupt corporation and knew and approved of the sale to Kaylor. At the latter's request, the trustee in bankruptcy, with the approval of the court, made a deed, dated March 22, 1915, to the defendant, Matoaka Coal Corporation, which almost immediately assumed the possession and operation of the property and plant and continued the same with results most unsatisfactory and disappointing to itself and to the lessor until shortly before this action was instituted.

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The record contains in great detail the history of the coal lease, with all of its vicissitudes and the many negotiations between the lessor and the lessee looking to the continued operation. This history and these negotiations, however, are not material at the present stage of the case except as they bear upon the correctness of certain rulings of the court at the trial; and in so far as thus material they will sufficiently appear in connection with a discussion of the various assignments of error which we shall now proceed to consider.

The first error assigned, and one which is very serious, relied upon, is that the court improperly refused a continuance upon the motion of the defendant. The motion was based upon the absence of one J. R. Chamberlain, whom the defendant wished to use as a witness. Chamberlain, a party residing in North Carolina, was largely interested in the defendant company, and had not been summoned as a witness. It is contended and may be conceded that the witness was called for trial, and a trial ordered by the court, earlier in the term than counsel for defendant anticipated; and upon their own showing they had no reason to suppose that a trial would not be had during the term, and no steps had been taken to have the witness in readiness to attend. The motion was for a continuance, not for a mere postponement to a later day in the term; but the defendant was not in a position to ask for either a continuance or a postponement, because when the case was first called on, Chamberlain was out of reach, having started from his home in North Carolina on a trip to Florida for a period of rest, and to recuperate his health, apparently leaving no information by which he could be located. The condition of his health was not such as to have prevented his attendance as a witness; for counsel stated to the circuit court, and they reiterate in their brief, that there would

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been "no trouble in getting him" if they could have located him after finding that they would have to go to trial. The plaintiff and its counsel had done nothing to lead the opposite side to suppose that a trial would not be demanded, and the nature and spirit of the controversy was such as to specially charge them with notice that any effort to continue the case would be resisted. Moreover, so far as the record discloses, the testimony of this witness would have been largely if not wholly cumulative and quite unlikely to have affected the result. "A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion unless plainly erroneous." (*Payne v. Zell*, 98 Va. 294, 295, 36 S. E. 379.) This familiar and well settled rule is not controverted by counsel for defendant, but they maintain that the instant case does not fall within its influence. We are of a contrary opinion. In our view of the evidence upon the question, the trial court did not abuse its discretion in refusing the continuance.

The second assignment of error involves the action of the court upon the instructions to the jury. In approaching the discussion of this branch of the case, it becomes necessary to set out in full section twelve of the lease, that section being the one upon which the controversy seems to have mainly turned. The section is as follows:

"If at any time during the existence of this lease the lessee, his assigns or successors, shall cease for the period of three months to operate the mines in the manner usual and herein contemplated, then such failure shall *ipso facto* work a forfeiture of this lease, and thereupon all improvements placed upon said property shall become the property of the lessor unless the delay is unavoidable and caused by circumstances beyond the control of the lessee."

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The instructions given and refused are reported in full with this opinion.

Plaintiff's instruction No. 1 told the jury that if they believed from the evidence that the defendant company ceased to mine and ship coal from the leased premises from the 11th of August, 1916, to or after the 12th of November, 1916, they should find for the plaintiff, unless they should believe "that the plaintiff waived this cause of forfeiture." The objection urged to this instruction is that it disregarded that portion of clause twelve of the lease providing against forfeiture for "delay which was unavoidable and caused by circumstances beyond the control of the lessee." This objection, in substance, is urged in connection with several of the instructions, and may be disposed of here once for all. The "circumstances beyond the control of the lessee" relied upon by the defendant to excuse it from the operation of the property during the period in question are an alleged general strike at the mines and an alleged mountain slide covering the tracks over which the coal had to be shipped. A careful consideration of the record fully satisfies us that unless we return to the scintilla doctrine and hold that an instruction must be given where the evidence in support of it is insufficient to sustain a verdict, the defendant was not entitled to have any instructions regarding these alleged excuses. The defendant was practically bankrupt, its plant was in poor condition, its miners had become restless and uneasy, and the very few laborers who were there when the mines closed quit work because of unsatisfactory conditions, due primarily to defendant's lack of funds. The slide referred to is shown to have been of trifling consequence. When steps were finally taken to move cars over the tracks, the so-called slide proved to be a very slight obstruction, and was cleared up in a few days. Upon no reasonable view of the case could it be held that

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re was either a strike or a slide of such character as to
use the lessee from the operation of the mines accord-
to contract.

Plaintiff's instruction No. 2, after quoting in full section
five of the lease, told the jury that if the defendant
used to operate the mines for want of funds, this could
be considered a delay that was unavoidable, or caused by
circumstances beyond its control; that the plaintiff had the
right to stand on the letter of its lease and to refuse the de-
fendant further indulgence for breaches of the same; and
that if the jury found that "on October 7th the plaintiff
told the defendant that in the future it would stand on the
strict letter of its lease and that future indulgence would
not be granted, and that defendant did not operate the
mines on plaintiff's property from August 11th to Novem-
ber 12th," they should return a verdict for the plaintiff.

It is urged that this instruction was wrong because it
told the jury, in effect, that on October 7th, after a consid-
erable portion of the three months had expired, the plain-
tiff could then recall a previous waiver of the twelfth clause
of the contract and, by a sort of retrospective action on its
part, claim a forfeiture under a three months' period be-
ginning August 11th, although, in the meantime, it might
have led the defendant to believe that it would not rely
on such ground of forfeiture. Every instruction must
be interpreted in the light of the facts of the particular
case. The objection made to this one upon its face would
appear to have some merit, but it has none when it is re-
called that shortly prior to August 11th the defendant had
been notified that it would not be further indulged and
could be expected to thereafter meet the requirements of
the lease, and that between August 11th and October 7th
the plaintiff company does not appear to have had any
knowledge of the fact that the mines were not being oper-
ated. On or about that date the representatives of the

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company did come into possession of this knowledge, while there was no obligation upon them to do so in view of the previous notice, they did call it sharply to the attention of the defendant at that time that a forfeiture would be enforced if the lease was not complied with. In view of the actual facts of the case the instruction would not have been bad if the court had not referred at all to the notice given to the defendant on October 7th, and the mention of it in the instruction amounted to nothing more than suggesting to the jury that if they believed that the plaintiff, after learning that the mines were not being operated, did not intend to mislead the defendant with reference to its attitude they should find for the plaintiff.

There is another objection urged to this instruction No. 2 which is based upon an interpretation sought to be placed by the defendant upon section twenty-three of the lease. That section provided, among other things, that "any failure on the part of the lessee to keep and perform any of the terms, conditions, covenants and agreements herein contained, on the part of the lessee to be kept, performed or fulfilled, which shall continue for a period of thirty days shall be deemed, at the option of the lessor, *ipso facto* to work a forfeiture of this lease."

The contention of the defendant in this connection is that the effect of this clause was to give the defendant the benefit of an additional thirty days before the forfeiture provided for in clause twelve should become effective. The court cannot accept this view. Under familiar rules of construction, the lease must be interpreted as a whole and in such a way, if possible, as to give effect to all of its provisions. There were many "covenants and agreements" by the lessee, and section twenty-three was a general forfeiture clause, while section twelve is a specific provision covering specific situations not embraced within the terms of

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general section. There is not, in our opinion, any room for doubt or dispute upon this point.

Plaintiff's instruction No. 3 tells the jury that if the defendant company failed to pay the royalties when due, and such failure continued for a period of more than thirty days prior to the institution of the suit, they should find for the plaintiff, unless they believed "that the same was waived by the plaintiff." The objection made to this instruction is that it is ambiguous and was liable to lead the jury to believe that it had reference to a waiver of the royalties themselves instead of a waiver of the forfeiture. We do not think there was any reasonable probability that the jury could have taken this view of the instruction. There had been a good deal of evidence in the case with reference to a remission of certain of the royalties, but, taken as a whole, and in view of the character of the controversy which was being waged before the jury, we think it practically certain that men of intelligence, as the jury must be presumed to have been, could not have misunderstood the meaning of the court, and we would be altogether unwarranted in reversing the judgment upon this objection to the instruction.

A second and equally untenable objection to this instruction is that it ignores the terms of section 2796 of the Code, requiring, in actions of ejectment based upon a right of re-entry for non-payment of rents, proof that there was no sufficient distress upon the premises. The amount of the rent exceeded the value of all the personal property on the premises, and the failure of the instruction to refer to the remedy by distress was therefore immaterial.

The third assignment of error calls in question the refusal of certain instructions asked for by the defendant. The criticism of the action of the court in this respect is based mainly upon reasons which have already been dis-

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posed of in the previous part of this opinion. Only two of the instructions refused seem to us to call for any special notice. The first of these is defendant's instruction No. 4, in which the court was asked to tell the jury that "if the plaintiff declared a forfeiture on one ground, without knowledge of other grounds of forfeiture, it must stand fall upon the ground declared." There was no error in refusing this instruction. When Mr. Scott, a representative of the plaintiff, went to the mines after they had been in for over three months, he told a representative of the defendant that he was there to declare a forfeiture under section twelve of the lease. When this action was tried, however, the plaintiff was required, upon the defendant's motion, to file a bill of particulars of its claim, and in doing so it set out a large number of additional grounds, including the failure to pay royalties, all of which were negatively in a statement of the grounds of defense. The case was tried upon the issue as thus defined. The contention upon which the defendant's proffered instruction No. 4 rests was not indicated in the grounds of defense, but upon the contrary one of those grounds was that "the plaintiff failed to give the defendant notice of any ground of forfeiture prior to the institution of this suit." The defendant cannot now be heard to say that the plaintiff did give notice of one distinct ground of forfeiture to the exclusion of others. There being nothing in this particular contention, the question of serving notice of the grounds of forfeiture is immaterial. No such notice was requisite. The defendant knew the terms of its contract. The institution of the suit was sufficient notice in advance of the trial; and the bill of particulars fully apprized it of the exact claim made by the plaintiff. The real controversy seems to have centered around the alleged failure to operate the mines and to pay the rents. If what transpired when Scott

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ered a forfeiture at the mines was relied upon as a waiver
a forfeiture for non-payment of rents, that question was
mitted to the jury in plaintiff's instruction 3 and under
defendant's instruction 9, and was by them found against
e defendant.

The other instruction, defendant's No. 18, which was re-
sed by the court and calls for some discussion, was to
e effect that the plaintiff could not recover unless the
atoaka Coal Corporation was actually occupying the
emises when the action was instituted. This instruction
esents the same question which is involved in defendant's
urth assignment of error, the latter challenging the ac-
n of the court in excluding from the jury a certain let-
from one D. H. Barger to the attorney for the defend-
t, containing the terms of a certain contract between
rger and the defendant, whereby Barger agreed to as-
me possession of and operate the mines.

It appears from the testimony of Barger and from the
ter in question, that on December 4, 1916, (without the
aintiff's consent or knowledge, and after it had signified
purpose to enforce the forfeiture) the defendant en-
red into a contract with Barger by virtue of which he
ok possession of the mines and mining plant and began
operate the same. This was a few days before the pres-
t action was brought, and the contention of the plaintiff
that the action could not be maintained without making
rger, as the party actually occupying the premises, a
rty defendant.

In our view of the whole of the evidence bearing on this
estion, including the contract which was excluded from
e jury but which the trial court saw and certified here
part of the record, we do not think that Barger can be
arded as the party in actual possession of the premises
thin the meaning of the statute, Code, section 2726, re-

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lied upon by defendant. He was operating the mines under a contract which gave him exclusive possession thereof for the time being, but that possession was not exclusive of and was subordinate to the possession of the entire 1, acre boundary by the defendant, as to which no change was made or intended to be made by the contract with Barger.

If, however, the contract with Barger be regarded as sub-letting to him whereby he became the under-tenant of the defendant and in full possession of the premises, the result is the same.

Section 2726, so far as material here, says: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adverse to the plaintiff may also at the discretion of the plaintiff be named defendants in the declaration." Prior to the amendment of this section by the act of February 26, 1895 (Acts 1895-6, p. 514) it directed that "the person actually occupying the premises shall be named defendant in the declaration."

The purpose of the amendment seems to have been to permit the plaintiff to join with the occupant as defendants any other persons claiming title to the land (B. Pl. and Pr., sec. 119, p. 200); and it may be conceded that the actual occupant is always a necessary party defendant to an action of ejectment in the sense that another defendant may by timely and proper procedure compel the plaintiff to bring the occupant before the court. The presence of the occupant, however, is not essential to the jurisdiction of the court, and if the claimant of the premises sued does not appropriately raise the point, and defend the action upon the merits, he is bound by the judgment.

The statute in question expressly makes the defendant in this case a proper party, and it was manifestly the party in interest. When called upon during the progress

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the trial, and in answer to its effort to avail itself of the absence of Barger as a party, to say whether it would enter a disclaimer, the emphatic answer was that it would not do so.

The defendant contends that it had the right to raise this question under the general issue. We do not think so. Assuming, for the sake of this discussion, that Barger was "the person actually occupying the premises" within the meaning of the statute, the failure to make him a party, if properly availed of, would have been reversible error, but it was a matter in abatement and not in bar and should have been so pleaded. Pleas in abatement for non-joinder of defendants are not common in actions *ex delicto*, but the reason for this is that in the great majority of tort actions the plaintiff may at his own option, sue one or any or all of those who have participated in the wrong; and in such cases the failure to join any or all participants as defendants is not a valid objection. *Burks Pl. & Pr.*, 55, 59; *Walton, etc., v. Miller*, 109 Va. 210, 220, 63 S. E. 458, 132 Am. St. Rep. 908; *Va. Ry., etc., Co. v. Hill*, 120 Va. 408, 91 S. E. 194. But when the reason ceases the law ceases, and where the plaintiff in actions *ex delicto* improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions *ex contractu*. There is no reason for any distinction in this respect between the two classes of actions, and none is made by the authorities. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement.

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See Graves' Notes on Pleading, sec. 6; Burks Pl. & Pr. 76; *National Fire Ins. Co. v. Catlin* (Corporation Ct. Danville), 8 Va. Law Reg. 127, 130; *Prunty v. Mitchell*, Va. 169; *Wilson v. McCormick*, 86 Va. 995, 11 S. E. Code, 1904, sec. 3261.

In this case the very contention which the defense presses upon us rests upon the assumption that the state makes the omitted defendant a necessary party. This being true, the authorities last cited are directly applicable and are conclusive against the defendant's position.

Section 2734 of the Code, restricting defendants in election to the plea of the general issue, refers only to pleas in bar and does not preclude pleas in abatement. 2 *Bartlett* Law Pr. 1125; Burks Pl. & Pr., p. 202; *James River Kanawha Co. v. Robinson*, 16 Gratt. (57 Va.) 434, 438.

Having seen that the failure to make Barger a party was not a matter in bar of the action, and could only be pleaded in abatement, it necessarily follows that the point was made either in due time or in due form, and was irretrievably lost after the defendant had pleaded the general issue, as he had done in this case. If the non-joinder had been properly presented in the form of a plea in abatement it could not have been received after the defendant had pleaded in bar. Code, sec. 3260.

There was no error in excluding the evidence of the tract with Barger and in refusing the instruction No. 1 asked for by the defendant.

The instructions, as a whole, presented fully and fairly to the jury every theory which, under the evidence, the defendant had a right to have the jury consider.

The remaining assignments of error are that the court erred in not setting aside the verdict as contrary to the law and the evidence, and in overruling the motion of the defendant in arrest of judgment. We have already seen

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the evidence was entirely sufficient to warrant the verdict. With reference to the motion in arrest of judgment, it is only necessary to say that, as shown above, there was no error in refusing the eighteenth instruction asked for by the defendant, and it was, therefore, manifestly proper for the court to overrule the motion in arrest, the instruction and the motion being based upon identically the same contention.

Upon the whole case, we are of opinion that there was no error in the judgment complained of, and it must be affirmed.

Affirmed.

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Staunton.

M. C. MCCORKLE & SON v. KINCAID AND OTHERS.

September 20, 1917.

Absent, Burks, J.

1. APPEAL AND ERROR—*Harmless Error—Construction of Contract by Court.*—Although it is error for an instruction to be given to the jury the construction of a contract when it was the duty of the court to construe it, yet where the error is favorable to the plaintiffs in error and not injurious to them, it is harmless as to them.
2. TREES AND TIMBER—*Sale of Standing Timber—Reservation of Tan Bark—Measure of Damages.*—A contract for the sale of growing timber gave the lumbermen two years from the date thereof within which to manufacture and remove the timber. The contract reserved to the landowners the tan bark of certain trees, which trees were to be felled and peeled by the landowners at such time "during the peeling seasons" as might be not be inconvenient to the lumbermen for the manufacture of the trees. It appeared that the tan bark could only be conveniently and profitably taken from the trees during the months of April, May and June. Upon a fair construction of this contract, the landowners were to have at least two peeling seasons in which to secure the tan bark, and the lumbermen violated the contract by felling the trees in question before the second tan bark season began. As the lumbermen were to have two years in which to perform their contract, so the landowners were also to have a reasonable time in which to secure the tan bark. That reasonable time is not indicated by the two years fixed for the benefit of the lumbermen, but also by the use of the plural "seasons" in the contract. The landowners were entitled to recover as damages the fair value of the tan bark of which they were deprived.
3. CONTRACTS—*Construction—Parol Evidence.*—The antecedent conversations and agreements between the parties, so far as they are in conflict with a written contract, cannot, of course, be received to vary or contradict it, but if its meaning be doubtful from the surrounding circumstances, the condition and a

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purposes of the parties, as well as the subject matter of the contract, may be proved by parol testimony in order to enable the court to determine its meaning.

MERCHANTABLE TIMBER.—A contract for the sale of growing timber provided that the timber was to be of sound, merchantable quality. Within the meaning of this contract, sound merchantable logs are logs that have a commercial value for manufacture into lumber and such as were ordinarily used for that purpose in that locality. What is merchantable in one locality may be unmerchantable in another locality, and it is error to instruct the jury that the test of whether a log has a merchantable value is that "when cut into lumber, it produced all or any of the grades of lumber known and recognized as merchantable lumber in the lumber markets."

TREES AND TIMBER—Sale of Growing Timber—Damages for Breach of Contract.—Where a landowner sells his timber and receives the purchase price therefor in full, upon condition that the timber is to be severed and removed within a limited time, then all such timber or logs, although paid for, which remain upon the property at the end of the time limited, revert to the owner of the land, and the lumberman cannot recover such timber or lumber, or the value thereof.

TREES AND TIMBER—Sale of Growing Timber—Damages for Breach of Contract.—Where a landowner sells his timber but does not receive the purchase price therefor in full, and timber covered by the contract is left growing, and logs left in the woods which should have been taken out, nevertheless the landowner cannot recover for the contract value of this timber and these logs because they remained his property and were still in his possession, and if they were utilized or by reasonable diligence could have been utilized by him, any amounts realized, or which could have been thus realized, therefrom should be set off against the damage which the jury might find in favor of the landowner.

TREES AND TIMBER—Contract of Sale—Lumber Used in Buildings.—A contract for the sale of growing timber provided that the lumbermen should have the right to erect on the premises necessary buildings for the manufacture of the timber, the buildings to revert to the landowner when the lumbermen had finished the manufacture and removal of the timber, and the amount of lumber used in the construction of the buildings to be deducted from the amount of timber measured during the current month. The words in the contract "amount of lumber" and "amount of timber" are to be construed to refer both to quantity and value, and where inferior timber is

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used in the construction of the buildings, only the actual value thereof should be deducted and not the average value of the lumbermen for all the logs.

8. TREES AND TIMBER—*Contract of Sale—Lumber Used in Buildings—Building.*—Platforms or docks running out on the mill floor upon which the lumber is taken and stacked for the purpose of drying, are not buildings within the meaning of the contract referred to in the preceding case, and hence the logs from which the lumber was made of which they were constructed should be paid for.

Error to a judgment of the Circuit Court of Lee County in an action of assumpsit. Judgment for plaintiffs. Defendants assign error.

Reversed.

The opinion states the case.

Irvine & Stuart and *C. R. McCorkle*, for the plaintiffs, assign error.

Bullitt & Chalkley and *Pennington & Pennington*, for the defendants, in error.

PRENTIS, J., delivered the opinion of the court.

B. F. Kincaid and Martha E. Kincaid, his wife, hereinafter called the landowners, by contract dated the 1st of December, 1912, sold the timber growing upon certain tracts of land owned by them to M. C. McCorkle & Son, plaintiffs in error, hereinafter called the lumbermen. This suit is brought to recover damages of them for breaches of that contract. So much of the contract involved will be hereinafter referred to and quoted. There was a verdict and judgment for the landowners.

The questions to be determined are not easy of solution.

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ne of the points of controversy requires the consideration of these clauses of the contract:

It is agreed between the parties hereto that the parties "the second part" (meaning the lumbermen) "shall have two years from the date hereof within which to manufacture and remove said timber from the said premises; provided, however, that if the parties of the second part shall find it necessary to suspend operations for a time, on account of unfavorable market conditions, or a general business depression, the time for the manufacture and removal of said timber shall be extended for a like period.

The parties of the first part (meaning the landowners) hereby reserve the tan bark on the aforesaid chestnut oak trees, which said trees are to be felled and peeled by the parties of the first part at such time during the peeling seasons as will not be inconvenient to the parties of the second part for the manufacture of said trees."

It appears that tan bark can only be conveniently and profitably taken from the trees during the months of April, May and June, when the trees are green and the sap is running. The lumbermen commenced cutting the timber in the early part of 1913 and completed it in April, 1914, so that the landowners had only one tan bark season, that of 1913, in which to fell these chestnut oak trees and secure the tan bark. A large part of these trees were felled by the lumbermen in 1914, before the tan bark season began, notwithstanding the protest of the landowners and they were thus deprived of their right to fell them and thus to secure the tan bark therefrom.

It is claimed for the lumbermen that the reservation of the tan bark and the right reserved by the landowners to fell the chestnut oak trees was only a subordinate feature of the contract and subject to their right to manufacture and remove all of the said timber within two years; that while they had the right to take two years in which to fell, manu-

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facture and remove it, they were under no obligation to take as long as two years, if they found it convenient to complete their work in less time; and that there was less timber upon the land than was anticipated, it would have been very inconvenient and expensive for the defendants to have prolonged their operations through the tan bark season of 1914.

On the other hand it is claimed for the landowners that a fair construction of the contract shows that they were to have at least two tan bark seasons in which to strip the tan bark, and that the lumbermen violated the contract by felling the chestnut oak trees before the second tan bark season began and thereby deprived them of the second tan bark which they had expressly reserved.

The trial court gave an instruction for the plaintiff marked No. 1, which reads thus:

"As to tan bark the court instructs the jury that where there is a plain written contract and nothing more, it is the duty of the court and not the jury to construe the contract and determine the meaning thereof; but where a contract is of doubtful meaning then verbal conversations and agreements between the parties before and at the time the contract is made are admissible in evidence for the purpose of clearing up such doubt, provided such verbal conversations and agreements do not contradict the written contract. It is for this reason that the court has admitted in evidence of what occurred between the parties about the tan bark before and at the time the contract was made. Under such circumstances it becomes the duty of the jury, guided by the court, to determine the meaning of the contract after considering the writing itself and all evidence in the case; and the jury are instructed that if they believe from said writing and said evidence that it was the intention of the parties that the plaintiffs should have two tan bark seasons in which to cut and peel said tan bark

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... were only to be required to cut and peel during the
... season the trees on the mountain side, then they will
... for the plaintiffs as to said tan bark the amount they
... believe from the evidence the same was worth as it
... on the trees at the time the trees were cut by defend-
... s."

This instruction is attacked upon the ground that it sub-
jects to the jury the construction of the contract, whereas
was the duty of the court to construe it. This is un-
doubtedly true, but in this case that error was favorable
to the plaintiffs in error and not injurious to them. While
no means free from doubt, it seems to us that the fair
construction of this contract is that, as both parties un-
derstood and believed that it would take at least two years
to cut and remove the timber, and that as the lumbermen
were to have two years in which to perform their contract,
the landowners were also to have a reasonable time in
which to secure the tan bark. That reasonable time is not
indicated by the two years fixed for the benefit of the
lumbermen, but also by use of the plural "seasons" in the
contract. The antecedent conversations and agreements
between the parties, so far as they are in conflict with the
written contract, cannot, of course, be received to vary or
contradict it, but if its meaning be doubtful the surround-
ing circumstances, the condition and avowed purposes of
the parties, as well as the subject matter of the contract,
may be proved by parol testimony in order to enable the
court to determine its meaning. It will be noted that in
the contract not only is the tan bark on the chestnut oak
reserved by the landowners, but the trees are to be
cut by them, and this reservation should be considered in
connection with that part of the contract giving the lum-
bermen two years in which to fell the other trees.

Upon a fair consideration of the language and subject
matter of the contract as well as the avowed purposes and

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objects thereof, we are of opinion that the court should have construed it to mean that the landowners were to have at least two peeling seasons within which to fell the trees and secure the tan bark; hence, that the action of the lumbermen in felling them before the two peeling seasons had elapsed was a violation of the contract, and that the landowners are entitled to recover as damages the value of the tan bark of which they were thus deprived by such violation.

2. The contract provided (referring to all of the timber) that "the said timber is to be of sound, merchantable quality, and is to be measured in the log, at the smallest diameter, according to Scribner's and Doyle's rules, as adopted by the Hardwood Manufacturers Association of the United States, on the skidway at the mill or mills to be erected by the parties of the second part on said premises, said measurement to be made at the joint expense of the parties hereto," etc.

It is alleged that the court erred in giving and refusing instructions and in admitting evidence as to the proper construction to be put upon the words, "the said timber to be of sound, merchantable quality." The evidence introduced threw little light on the question and cannot be said to have either harmed or helped either party to the controversy.

The court, however, gave an instruction reading thus: "The court further instructs the jury that a sound, merchantable log is a log that has a commercial value, and has a commercial value if, when cut into lumber, it produces all or any of the grades of lumber known and recognized as merchantable lumber in the lumber markets."

The question as to what is a merchantable, sound log was considered in the case of *Tenny & McKenzie v. McManey & Bemis*, 9 Ore. 405, where the court in construing the words "sound, merchantable logs" says this: "The

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chantable' logs, then, in reference to the business of manufacturing lumber in any particular locality, are such logs as are ordinarily used for that purpose at that particular place, and if the usage of the business in that locality requires the logs ordinarily used to be 'good and sound,' then the word 'merchantable' would include the particular meaning of each, and render their employment of no utility in any such contract. But whatever distinction should properly be made as to the respective meanings of the words used in this instance, we think it was clearly competent to show by the witness that the logs in controversy were of the quality usually manufactured into lumber in that locality, to prove that they were 'merchantable' logs."

In *Wright v. Bentley Lumber Co.*, 186 Ala. 619, 65 So. 354, this is said: "As to what was merchantable pine timber in 1906, was a question of proof, and it was incumbent upon the defendants to show that the timber cut and removed by them came within the deed under which they were claiming. 'Merchantable pine timber' referred to the sale and manufacture of pine timber, and included such timber as was ordinarily used for sale or manufacture in that locality."

This definition meets with our approval. What is merchantable in one locality may be unmerchantable in another locality, and the court erred when it instructed the jury that the test of whether a log has a merchantable value is that "when cut into lumber, it produced all or any of the grades of lumber known and recognized as merchantable lumber in the lumber markets." This is a contract referring primarily to logs and not to lumber, and the jury should have been told that, within the meaning of this contract, sound, merchantable logs are logs that have a commercial value for manufacture into lumber and such as were ordinarily used for that purpose in that locality. Under the instruction as given, the jury would have been

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justified in finding that any tree in the woods might have produced some small quantity of some inferior grade of merchantable lumber, and hence that every log not decayed was merchantable. We therefore think that the instruction as given was erroneous.

3. Plaintiffs' instruction No. 2, given by the court, was as follows: "The court further instructs the jury that in deciding whether timber is merchantable or not they are not to take into consideration where the timber was located nor whether it could be hauled out and manufactured by the defendants at a profit or not. It makes no difference whether it may cost to get it out more or less than it will yield.

"The court further instructs the jury that they will find for the plaintiffs the value at the contract prices of all timber (if any) that was sound and merchantable and left in the woods by defendants."

The last clause of this instruction is erroneous, because it tells the jury that they must find for the plaintiffs the value at contract prices of all timber, if any, that was sound and merchantable and left in the woods by defendants.

In this connection the defendants asked the court to give an instruction which presents the contrary view and reads thus: "The court further instructs the jury that even if they should believe from the evidence that the defendants did not pay plaintiffs for all the logs and trees which they contracted to pay for but left some trees and some logs on the lands covered by the contract in question for which they did not pay, but should have paid, yet if they further believe from the evidence that the plaintiffs utilized all the trees and logs so left, or any part of them, and realized anything therefor, or by the use of reasonable diligence could have utilized the same and realized therefor, or even yet do so, then such sums as the plaintiffs realized, or

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the use of reasonable diligence should have realized, or can yet realize therefor, or for the use thereof, must be credited to the defendants against any damages which the jury may find for the plaintiffs, but not so as to exceed the same."

The lumbermen's theory of the case thus presented was that, even though timber covered by the contract had been left growing, and even if logs had been left in the woods which should have been taken out, nevertheless the landowners could not recover for the value of this timber and these logs because they remained their property and were still in their possession, and that if they were utilized by them, or by reasonable diligence could have been utilized by them, any amounts realized, or which could have been thus realized, therefrom should be set off against the damage which the jury might find in their favor. This latter view is the correct one. The question was, what was the landowners' damage for the failure to take the sound and merchantable logs which, under the contract, still remained the property of the plaintiff? The court seems to have taken the view that the case was controlled by a line of cases involving a different principle, for it is perfectly well settled in this State by the cases of *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189; *Blackstone Mfg. Co. v. Allen*, 117 Va. 452, 85 S. E. 568, and *Wheeler Co. v. Hite*, 119 Va. 345, 89 S. E. 101, that where a landowner sells his timber and receives the purchase price therefor in full, upon condition that the timber is to be severed and removed within a limited time, then all such timber or logs, although paid for, which remain upon the property at the end of the time limited revert to the owner of the land, and that the lumberman cannot recover such timber or lumber, or the value thereof. In those cases, however, the landowner was making no claim whatever against the lumberman. Here the landowner is suing the lumberman, and while entitled to

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recover for all damage which he has suffered by virtue of the breach of the contract, he is not entitled to recover damage which he has not suffered. So that in this case the lumbermen who were being charged with the value of this growing and severed timber, were entitled to set against such claim any sum which might fairly be realized by the landowners from logs and timber which were in their possession and ownership. The soundness of this view may be illustrated by supposing that the lumbermen had done nothing under their contract and at the end of the two years the landowners were in possession of the property just as it existed when the contract was made. Undoubtedly an action would lie against the lumbermen for the damage arising from the breach of their contract, but in such case it would be erroneous not to instruct the jury that they must take into consideration the fact that the landowners still owned all of the timber. If the value of the timber in the meanwhile had greatly enhanced, the lumbermen would have suffered little, possibly no damage; if it had greatly depreciated, their damage would be material.

We are, therefore, of opinion that the last clause of the plaintiffs' instruction No. 2 is erroneous, and in lieu thereof the court should have given defendants' instruction No. 2.

4. One clause of the contract provided that the lumbermen should "have the right to erect all buildings on said premises which they may deem necessary for their use in the manufacture and removal of said timber, said buildings to revert to the parties of the first part when the parties of the second part shall have finished the manufacture and removal of said timber, and the amount of lumber used in the construction of such buildings is to be deducted from the amount of timber measured during the current month."

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As to this clause this controversy arose: The lumbermen undertook to deduct for the lumber that went into the houses \$5.87 per thousand, which was the average price they had paid the landowners for all the logs, whereas the landowners undertook to prove that the value of the lumber which went into these houses was very much below the average, and hence that only the actual value thereof in the log should be deducted. We think that this latter contention is the correct one, and, therefore, that the court correctly instructed the jury on this point. The words in the contract "amount of lumber" and "amount of timber" should be construed to refer both to quantity and value.

5. Another point of controversy was that the lumbermen claimed that certain structures called "docks" should be construed to be buildings within the meaning of the contract. If they are such buildings, then the value of the lumber used for their construction is not to be paid for. It is claimed by the landowners that these docks, which appear to be platforms running out on a level with the mill floor upon which the lumber is taken on cars and stacked for the purpose of drying, are not buildings within the meaning of the contract, and hence that the logs from which the lumber was made out of which they were constructed should be paid for.

The amount involved is not large, but we think that these docks, constructed for the convenience of the lumbermen, and of no appreciable value to the landowners, cannot be considered as buildings, within the meaning of this contract, and hence that the landowners are entitled to be paid for the lumber used in their construction. If it is practicable to ascertain the value of such lumber, measured by the price at which the McCorkles were to pay for the logs which produced it, then this is the proper

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measure of compensation therefor; if this value cannot be ascertained, then compensation should be fixed at the average value of the logs referred to.

The case has many complications, but upon the whole we are of the opinion that the trial court committed harmful errors against the plaintiffs in error (1) in its instructions to the jury as to the meaning of the language of the contract requiring the timber to be of sound, merchantable quality; (2) in giving plaintiffs' instruction No. 2 without modification; and (3) in failing to give the defendant instruction No. 2, authorizing the lumbermen to set off against any damages which the landowners might have suffered the fair value to such landowners of the logs and trees which were left upon their land. Therefore, the verdict of the jury will be set aside, the judgment reversed and the case remanded for a new trial in accordance with the views herein expressed.

Reversed.

Statement.

Staunton.

PETERS v. PETERS.

September 20, 1917.

1. DISMISSAL, DISCONTINUANCE AND NONSUIT—*Reinstatement of Cause.*—In a suit regarding lands, a consent decree was entered awarding the complainant a writ of possession for the lands, and retiring the cause from the docket, with leave to either party to reinstate upon reasonable notice to the adverse party. Twenty years or more afterwards notice was issued by the wife of the original complainant, not a party to the suit, addressed to the defendants in the original suit and appellant, not a party to that suit, that she would move the court to reinstate the cause in order that she might obtain from the court an order for a writ of possession of the land. Upon this notice and without other allegations, or evidence, the court entered a decree awarding the writ of possession asked for.

Held: Error upon the part of the court. The proceeding under the notice was neither a suit in equity, an action at law, nor based upon any statute. The wife of the original complainant was not a party to the original suit; neither was the appellant. Whatever the effect, if any, of the leave given to either party to reinstate the suit in the original decree, such privilege could only have been exercised within a reasonable time, and by one of the parties to the original suit. The court had no jurisdiction over either the party seeking to reinstate the cause or the appellant, nor over the land apparently involved in the controversy. The decree, therefore, was void.

Appeal from a decree of the Circuit Court of Scott county. Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

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W. S. Cox, for the appellant.

H. C. L. Richmond, for the appellee.

PRENTIS, J., delivered the opinion of the court.

This is an appeal from a decree entered January 22, 19 under the following circumstances: In 1895 C. C. Pet filed his bill against his son-in-law, D. C. Flanary, and three infant children, alleging, in substance, that he, Pet and his wife, Martha A. Peters, had on the 6th day of Ap 1887, conveyed a certain tract of land in Scott county, V ginia, to his daughter, Louisa H. Flanary; that his dau ter had died leaving three infant children as her heirs law, the youngest of whom at that time was seven ye old; that in the conveyance the grantors reserved a lien their maintenance during their natural lives; that Flan and his children were in possession of the land and tak the profits arising therefrom; that Flanary was insolve and that he had been unable to induce Flanary to pay reasonable compensation for the maintenance of him and his wife, and praying for pecuniary compensation satisfaction of the lien.

The guardian *ad litem* for the infants filed formal ans to the bill, and Flanary answered, expressing his surp at the institution of the suit and alleged that he belie that it was because of some differences which had arisen tween himself and his father-in-law; that the land was most worthless and certainly not worth a law suit; and t he would be perfectly willing to abandon the land and liver it to the complainant, and asked that he be relie from any costs.

Thereupon on November 23, 1895, a decree was ente to which Flanary consented, providing that possession the land be delivered to the complainant, C. C. Peters

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Martha A. Peters, his wife, to be by them held and used during their natural life, and as tenants for life, they to keep taxes paid thereon, and a writ of possession therefor awarded and no costs taxed against the defendants. The final clause of the decree reads thus: "And the cause be retired from the docket with leave to either party to re-estate upon reasonable notice to the adverse party."

Nothing more appears in the record before us until the decree upon which the decree complained of is based was entered by Martha A. Peters, survivor, etc., addressed to the defendants in the original suit and to John M. Peters, the appellant. This notice reads thus:

"You will please take notice that on the 18th day of January, 1916, that day being the first day of the January term of the Circuit Court for Scott county, Virginia, we will move the said court to reinstate on its court docket the retired chancery cause styled, *C. C. Peters versus D. C. Peters et als.*, pursuant to a decree entered in said cause on the 23rd day of November, 1895. The object of the reinstatement of said chancery cause is to obtain from said court an order for a writ of possession of the land mentioned in the bill and proceedings." There is a note by the clerk that this notice was served on the defendants to the original suit by order of publication, they being non-residents.

Upon this notice and without other allegation, or evidence, the court entered the decree complained of, awarding Martha A. Peters a writ of possession for the land.

That the court erred in entering this decree appears to be manifest from a recital of these facts. The proceeding under the notice is neither a suit in equity, an action at law, nor based upon any statute. Martha A. Peters was not a party to the original suit; neither was John M. Peters, the appellant here. Whatever the effect, if any, of the leave given to either party to reinstate the suit in the decree of

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November 23, 1895, such privilege certainly could have been exercised within a reasonable time, and by one of the parties to the original suit. As neither Martha A. Peters nor John M. Peters were parties to that suit, the cause could not be reinstated upon the notice by Martha A. Peters. If John M. Peters is now in possession of the property, and if Martha A. Peters is now entitled to possession thereof, she should assert her right thereto in a proper proceeding alleging and proving the facts upon which she bases her claim. The court in this proceeding had no jurisdiction over either John M. Peters or Martha A. Peters, nor over the land apparently involved in the controversy, and the decree complained of is void. *Battle v. Maryland Hospital for the Insane*, 76 Va. 63; *Wade v. Cock*, 76 Va. 626; *Smith v. Powell*, 98 Va. 431, 36 S. E. 786; *Echols v. Brennan*, 99 Va. 150, 37 S. E. 786; *Snead v. Kinson*, 121 Va. 182, 92 S. E. 835.

The court will dismiss this proceeding.

Reversed.

Syllabus.

Staunton.

RINER v. LESTER.

September 20, 1917.

1. VENDOR AND PURCHASER—*Rescission—Variance Between Executory Contract and Deed.*—Where, in accordance with an executory contract of sale, there has been a valid delivery and acceptance of a deed, and an execution and delivery of the purchase money bonds, the vendee is concluded from asserting that an exception in the deed of three acres included in the metes and bounds, previously conveyed by the vendor to another, was a material departure from the terms of the executory contract entitling her to a rescission.
2. VENDOR AND PURCHASER—*Construction of Contract.*—In a written contract for the sale of land the vendor agreed to convey to the vendee by deed with general warranty of title, a tract of land supposed to consist of 108 acres, more or less, and all the buildings and improvements thereon, which was conveyed to said vendor by his father by a certain deed, which land had for a number of years been occupied by the vendor as a home. A deed conveying 107½ acres of the land conveyed to vendor by his father by the deed referred to, which had long been occupied by the vendor as a home place, complies with this contract, although this 107½ acres was not all of the tract conveyed to the vendor by his father in the deed referred to, the vendor having twelve years previously conveyed three acres to another party, who had at once built upon and improved the premises. There was evidence that the vendee knew of this sale and from her conduct it appeared that she knew that the three acres in question were not included in her contract with the vendor.
3. VENDOR AND PURCHASER—*Parol Evidence.*—Where, in construing a contract of sale, the knowledge of the vendee of the prior conveyance of three acres of the land in question to another by the vendor, was a material fact for the court to know in determining the probable intention of the parties, the testimony of the husband of the vendee that the vendor had told him that after taking off the three acres from the tract 108 acres would

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remain, was not objectionable as in violation of the rule against the use of parol evidence to vary the terms of a written tract.

4. **VENDOR AND PURCHASER—Boundaries—Reference to Prior Deed.** Where a written contract for the sale of land described the subject matter of the sale as the tract which was conveyed to the vendor by his father by a certain deed, the vendee is charged with knowledge of the boundaries of the tract, as described in that deed.
5. **VENDOR AND PURCHASER—Encumbrances.**—Mere knowledge of an encumbrance at the time of the contract, and the mere taking of possession with such knowledge, especially where the contract provides for possession in advance of the conveyance, does not necessarily cut off a defense against the specific execution of a contract for the sale of real estate; but where the circumstances and the conduct of the parties show that the existence of an open, visible, physical encumbrance of the property have been taken into consideration in fixing the price of the property, the purchaser can neither refuse to complete the purchase nor require an abatement of the price. This rule is its most frequent expression in cases involving public highways, but this is due mainly to the fact that public highways are always open and visible, and the reason of the rule applies to any visible and obvious physical servitude. In such case the covenant of general warranty is not broken by the continued adverse use of the road or right of way.

Appeal from a decree of the Circuit Court of Montgomery county. Decree for defendant. Complainant appeals.

Reversed.

The opinion states the case.

M. H. Tompkins and Jordan & Roop, for the appellants.

Harless & Colhoun, for the appellee.

KELLY, J., delivered the opinion of the court.

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On September 2, 1914, W. T. Riner entered into a written contract with Mrs. E. P. Lester whereby he agreed to sell and convey to her "by deed with general warranty of title—that tract of land, supposed to contain 108 acres, more or less, and all buildings and improvements thereon, which was conveyed to said W. T. Riner by his father, David Riner, by deed dated the 1st day of April, 1884, which land—has for a number of years been occupied by said party of the first part (W. T. Riner) as a home." The contract further specified that the consideration was to be \$13,000, payable in three instalments, \$4,333.33 on January 1, 1915, \$4,333.34 on January 1, 1916, and \$4,333.33 on January 1, 1917, the last two instalments to be evidenced by interest bearing bonds secured by vendor's retained lien in the deed, which, like the bonds, was to be dated January 1, 1915. Possession of the land "for fall seeding and for the purpose of making improvements" was to be given on the date of the contract, and "possession of any other kind and for any and all other purposes, on April 1, 1915. Subsequent to the date of the contract its terms were changed by mutual consent so as to extend the time for the cash payment from January 1, 1915, to May 1, 1915. A deed dated January 1, 1915, was prepared and executed by Riner which, according to his contention (denied by Mrs. Lester), was duly delivered and was in all respects in compliance with the contract as understood and construed by both parties. Mrs. Lester executed and delivered to Riner her three bonds dated January 1, 1915, for the instalments of purchase money mentioned in the contract, all of which were recited in the deed and secured by a vendor's lien retained therein, and all of which indicated upon their face that they were thus secured.

Possession was given by Riner and assumed by Mrs. Lester in accordance with the contract, and the latter re-

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mained in full possession from the spring of 1915 to the date of the decree under review, July 26, 1916, a receiver was appointed to take charge of the premises.

On May 25, 1915, Mrs. Lester paid Riner \$1,000 and on November 13, 1915, \$500, as credits on the bond due 1st in that year, but she failed to make further payments and this suit was brought by Riner to enforce his vendor's lien. Mrs. Lester answered the bill setting up the defenses hereinafter mentioned, and the cause having been matured for hearing upon the evidence introduced by both sides, the court entered a decree, evidently upon the theory that there had been no valid delivery of the deed, denying the relief prayed for in the bill, cancelling the contract, directing an account to ascertain the purchase money already paid, the value of the rents with which Mrs. Lester should be charged and the improvements on the land which she should be credited, and other items deemed necessary by the court in order to enable it to render a decree carrying into effect the rescission of the contract.

The answer sets up four grounds of defense to the bill, two of which are wholly without merit and are not, as we understand, relied upon by the defendant. The other two grounds will be disposed of in the order in which they appear in the answer.

1. The deed of January 1, 1915, from W. T. Riner to Mrs. Lester described the land as "containing 108 acres more or less, with all the buildings and improvements thereon, being the same land that was conveyed to W. T. Riner by David Riner by deed dated April 1, 1884, except that W. T. Riner has conveyed to Letcher Lawrence about 10 acres off of said land." This general description was followed by one giving the metes and bounds of the original David Riner tract and added these words: "There is included in these metes and bounds and is excepted therefrom the land conveyed to Letcher Lawrence."

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It is contended on behalf of Mrs. Lester that this exception of three acres is a material departure from the terms of the contract, and, furthermore, that as it has now been disclosed that the plaintiff does not own the entire boundary agreed to be conveyed, he neither has made, nor can make, a satisfactory deed and must submit to a rescission of the trade.

It is manifest that if there was a valid delivery and acceptance of the deed, and an execution and delivery of the purchase money bonds in accordance therewith, these facts conclude the defendant and end the controversy on this branch of the case.

Both Mrs. Lester and her husband testified that they never saw the deed and never knew of its exact contents until after this suit was brought. We are constrained to the conclusion that the clear weight of the testimony is to the contrary. M. H. Tompkins, the attorney with whom the Lesters had left the original contract and who prepared the deed and the purchase money bonds in question, testified that Mrs. Lester and her husband and W. T. Riner came to his office sometime in January, 1915, for the purpose of having him to prepare these papers, that the exception was discussed and understood by them all, and that the deed after being prepared was read to Mr. and Mrs. Lester, and was then executed and then left with him for them in his capacity as their attorney. He was paid \$5.00 by Riner for writing the deed but did not at that time represent him otherwise, his relationship to the transaction and the parties, unquestionably remaining then, as it had theretofore been, that of counsel and attorney for the Lesters. Tompkins further testified that when the deed was prepared, he also prepared the purchase money bonds. It is not denied that these bonds were executed as recited

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in the deed, that they were delivered to Riner, and Mrs. Lester made the two payments thereon in March, November following, as recited above.

After Mrs. Lester had made default in meeting the payment, Riner spoke to Tompkins about bringing a suit. His reply was that as he had represented the parties to the contract and deed, he doubted whether he should do so, or words to that effect, but subsequently according to his statement, he saw the Lesters about the matter and they told him that if a suit had to be brought, they would prefer that he should bring it. Mrs. Lester incidentally contradicts Tompkins in this respect but he is corroborated by a letter which he wrote to G. E. Lester at the time this suit was brought, and by Lester's letter. Tompkins in his letter said to Lester: "You understand my position in this matter. You have always told me that if the suit had to come you would rather I would have it brought by any one else. I have represented you all in this matter and I hope it can be adjusted along the lines that you all have been trying to arrange. Let me hear from you." I do not without questioning the facts recited by Tompkins, recite as follows: "Your letter of January 3rd duly received. I am sorry our friend took the position in the matter which he did as it may hurt us in closing the deal which was pending and which was ready to close. I requested Stauffer to write you in the matter and I trust he has done so. You will hear further from me within the next day or so, or as soon as I know just what can be done and at what date." The fact that Tompkins was originally the attorney for the Lesters and subsequently with their consent brought the present suit, explains how it happened that the deed which had never left his possession since the day of its delivery, was produced by him and filed with the bill.

They admit that Tompkins told them he had the deed but claim that he said there was to be no delivery

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the first payment was made, and that they asked no questions about it and never saw it. We think the version of the transaction as given by Tompkins is far more probable upon its face, and is strongly corroborated by the course of the relevant events and circumstances.

But even if the deed was never delivered, the result must be the same. There is no substantial reason upon which the appellee can base any claim that she contracted for any more or any different land than that which she actually gets under the deed. She did not get all the land conveyed to W. T. Riner by David Riner, but she did get what she contracted for, namely: "a tract of land supposed to contain 108 acres, more or less, and all the buildings and improvements thereon which was conveyed to said W. T. Riner by his father, David Riner, by deed dated on the 1st day of April, 1884, *which land—has for a number of years been occupied by said party of the first part (W. T. Riner) as a home.*" W. T. Riner had not occupied as a home or otherwise any part of the Letcher Lawrence three acres for a number of years. The original David Riner tract contained about 111 acres, although at the time of the conveyance to W. T. Riner by his father, it was believed to contain about 108 acres. Deducting the three acres sold to Letcher Lawrence, Mrs. Lester gets about 108 acres (107½ acres by actual measurement), the very land with the buildings and improvements thereon which was and had long been occupied by W. T. Riner as a home place, and the very land which her own practical construction of the contract, as conclusively disclosed by her conduct, shows she thought she was getting. This Lawrence three acres was conveyed by W. T. Riner twelve years before he sold the residue of the tract to Mrs. Lester. Lawrence at once took possession of the three acres, built a house and planted an orchard thereon, and otherwise improved the premises. The Lawrence place, at the time of the sale of the 108 acres to

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Mrs. Lester, was worth perhaps \$4,000.00. The house that place was in plain view of the residence of Mrs. Lester. Her husband had lived in that immediate neighborhood his life and she had lived there for something like 10 years. It is certain that they never once imagined that they were getting the Lawrence land. Indeed, the question as to this three acres would seem to be put to rest by the testimony of G. E. Lester himself. We quote from his deposition: "Q. Mr. Riner contends that Mrs. Lester was getting 107½ acres in the deed which I just handed her. How many acres does she get? A. Mr. Riner stated that the original survey was 111 acres and that with three acres which had been cut off to L. L. Lawrence we would have 108 acres." This was on his direct examination as a witness for his wife, and the following question and answer appear in his cross examination: "Q. I believe you stated that Mr. Riner told you the original survey of the Riner land called for 111 acres and that you would get 108 acres after taking off the three acres Mr. L. L. Lawrence would have? A. That is correct." It is true that G. E. Lester claimed that he had no authority to act for his wife in the matter, but the record leaves no room to dispute that he did act with her and for her throughout the negotiations leading up to the sale, and subsequently until this suit was brought. The testimony above quoted was not objected to, and was not subject to objection as being in violation of the rule against the use of parol evidence to vary the terms of a written contract. Taking the language of the contract as a whole, its terms are not inconsistent with the meaning contended for by the appellant, and the fact that the appellee had knowledge at the date of the contract that the three acres had been sold to Lawrence, was a material fact known to the court to know in determining the probable intention of the parties.

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2. A second defense set up in the answer and relied upon is, that David Riner, by a deed of December 12, 1884, had granted to one J. L. Stone, a right of way or road along one side of the tract of land sold by W. T. Riner to Mrs. Lester, which right of way or road "had passed to other hands and beyond the control of the complainant." The record discloses that this right of way was created and existed for the benefit of two other tracts of land, one of which, at the date of the contract, was owned exclusively by Mrs. Lester herself, and in the other of which she owned an undivided two-thirds interest, the remaining one-third belonging to a brother of her husband, both interests being subject to a dower right owned by her husband's mother. Her husband had been using and traveling this right of way practically all his life and she had been traveling over it ever since she had been in that neighborhood, which was about four years. The record title to the right of way was plainly disclosed by deeds directly in the chain of title to the land which she bought from Riner. The right of way is located along one side of the 108-acre tract and she and her husband undertake to claim that while they knew about the road, they did not know it had been carved off or out of the 108 acres. It was plainly included in the boundaries of the land as described in the deed from David Riner to W. T. Riner, and she is charged with knowledge of those boundaries. Independent of and aside from the fact that the right of way was for the benefit of one tract of which she was the exclusive owner at the time of the contract, and of another tract in which she owned an undivided two-thirds interest—extinguishing the easement as to the one and showing the improbability of loss or inconvenience, if not indeed a benefit, to her from the easement as to the other—she bought with knowledge of it, she took and held possession and never once complained about it or urged its existence as an excuse for refusing to carry

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out the contract until after this suit was brought. M knowledge of an incumbrance at the time of the contr and the mere taking possession with such knowledge, pecially where the contract provides for possession in vance of the conveyance, does not necessarily cut off a fense against the specific execution of a contract for sale of real estate; but where the circumstances and conduct of the parties show that the existence of an op visible, physical incumbrance of the property must h been taken into consideration in fixing the price of property, the purchaser can neither refuse to complete purchase nor require an abatement of the price. This r finds its most frequent expression in cases involving pub highways, but this is due mainly to the fact that pub highways are always open and visible, and the reason the rule applies to any visible and obvious physical ser tude. In such cases a covenant of general warranty is broken by the continued adverse use of the road or rig of way. See *Deacons v. Doyle*, 75 Va. 258, 261; *Bennett Booth*, 70 W. Va. 264, 73 S. E. 909, 39 L. R. A. (N. S.) 6 Maupin on Marketable Title to Real Estate, section 85, 196, 197, 306-309; *Sachs v. Owings*, 121 Va. 162, 92 S. 997, 1000.

In view of our conclusion upon the facts of the case, the question discussed by counsel, as to whether this must be regarded as a suit to enforce a vendor's lien or as a suit to specifically enforce the contract, is immaterial. In either event, the complainant is plainly entitled to a decree for the sale of the land, to satisfy the purchase money; and the decree complained of will accordingly be reversed and annulled and the cause remanded to the lower court for further proceedings to be had in accordance with this opinion.

Reversed

Syllabus.

Staunton.

ROBERTS V. HAGAN.

September 20, 1917.

1. **VENDOR AND PURCHASER—*Relief in Equity Against Collection of Purchase Money.***—In Virginia, the rule is that to entitle a purchaser of real estate to relief in equity against the collection of the purchase money on the ground of a defective title where the sale has been consummated by the execution and acceptance of a general warranty deed (without other covenants), the title must be questioned by a suit either prosecuted or threatened, or it must be clearly shown that the title is defective. Uncertainty about the existence of a will of a prior owner of the land through whom the vendor claims, and about its provisions if it does exist, does not constitute such clear defect in the title as to afford the vendee any ground for relief against the payment of the purchase money.
2. **INSANITY—*Sale of Land—Collateral Attack.***—The interest of one of the heirs of a decedent was sold pursuant to the prayer of a petition filed in a partition suit by her brother, who claimed to be her committee. The evidence of his appointment as such was unsatisfactory and the evidence of her insanity wholly insufficient. This latter fact, in itself, constituted a fatal defect in the proceedings by the alleged committee; and, moreover, those proceedings were wholly wanting in some of the jurisdictional requirements of the statute (Code, chapter 117) relating to the sale of lands of persons under disability. The sale, therefore, was void and subject to collateral attack.
3. **PARTITION—*Section 2564 of the Code of 1904—Equity.***—By a proper method, under section 2564, Code of 1904, it would have been entirely within the power of the court in a suit for the partition of a decedent's estate by the purchaser of the interests of some of the heirs, to have assigned to the purchaser the entire estate to be partitioned, upon his payment to the other heirs of the amounts to which they would be entitled for their interests. But as section 2564 created and conferred a special statutory jurisdiction upon the court, a failure to comply

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with its provisions was fatal to the proceeding. Equi no inherent jurisdiction to order a sale of land for the p of partition.

4. PARTITION—*Section 2564 of the Code of 1904—Sale of Und Interest.*—Code of 1904, section 2564, provides that whe titution cannot be conveniently made, the entire subject n allotted to any party who will accept it and pay for the interests. Or if the interests of those who are entitled subject will be promoted by a sale of the entire subj allotment of part and sale of the residue, the court may such sale and allotment. There is no warrant in this s for selling by a public and enforced sale an undivided i in the estate. The sale must be made in the executio general partition scheme, in which all the parties are equal consideration.
5. PARTITION—*Section 2564 of the Code of 1904.*—Wherever, section 2564 of the Code of 1904, there is a sale of a pa an allotment of the residue, the part allotted must be d in kind, and the residue must be sold and the proceeds d the division in each case being made among all the par interest.
6. VENDOR AND PURCHASER—*Vendor's Lien—Priority.*—No l encumbrance created or suffered by the vendee can prej prior lien for the purchase money.

Appeal from a decree of the Circuit Court of Wise co
Decree for complainant. Defendant appeals.

Revers

The opinion states the case.

E. M. Fulton, for the appellant.

Bond & Bruce and *Robert L. Pennington*, for the s
lee.

KELLY, J., delivered the opinion of the court.

On September 18, 1909, Patrick Hagan conveyed
G. Wells a tract of land and retained a vendor's lien th

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to secure \$1,500 of the purchase money. The conveyance was made "with covenants of general warranty."

On March 15, 1911, T. G. Wells conveyed the same land to W. H. Roberts, who, as a part of the consideration therefor, assumed the payment of the money secured by the vendor's lien retained in the former deed.

Subsequently, Patrick Hagan executed a general deed of trust to C. F. Hagan conveying to him what appears from the deed to have been a very large and valuable real and personal estate, with specific directions as to its management and distribution. Under the terms of this deed of trust, C. F. Hagan, as trustee, became the owner of the debt and lien above mentioned, with the right to enforce the same, and this suit was brought by him for that purpose. Wells did not appear. Roberts answered, alleging the insolvency of Wells, and defended upon the ground of alleged defects in the title to the land. The circuit court decreed a sale to enforce the lien, and Roberts appeals.

In Virginia, the rule is that to entitle a purchaser of real estate to relief in equity against the collection of the purchase money on the ground of a defective title, where, as here, the sale has been consummated by the execution and acceptance of a general warranty deed (without other covenants), the title must be questioned by a suit either prosecuted or threatened, or it must be clearly shown that the title is defective. *Ralston v. Miller*, 3 Rand. (24 Va.) 44, 48, 15 Am. Dec. 704; *Koger v. Kane*, 5 Leigh (32 Va.) 607, 609; *Morgan v. Glendy*, 92 Va. 86, 89, 22 S. E. 854; *Pack v. Whitaker*, 110 Va. 122, 125, 65 S. E. 496.

Patrick Hagan's claim to the land was derived from the heirs of Martha Holdway. It is conceded that she had a good title thereto, but the appellant contends that her interest therein does not satisfactorily appear to have ever been fully acquired by Hagan.

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The first objection urged against the Hagan title is Mrs. Holdway appears to have made a will of which neither the original nor any copy has been produced, and that all appellant knows she may have devised the land to persons other than her heirs at law under whom Hagan claims. The only facts appearing in the record regarding this alleged will are as follows: After Mrs. Holdway's death Patrick Hagan brought a suit in equity (known in the record and hereinafter referred to as the partition suit) against certain of her heirs, alleging that he had acquired the interests of the other heirs to the land, and prayed for a partition or sale, in accordance with what the court might deem "best for all parties concerned." The bill in that suit stated, among other things, that Mrs. Holdway had devised the land to her husband for life, and that at his death "the same descended to the heirs at law of Martha E. Holdway, who were her six brothers and sisters." The answer and cross-bill in the present suit filed by the defendant, Roberts (appellant here), sets out the partition suit at length, and, with special reference to the point now under consideration, avers that "no will of Martha E. Holdway has ever been admitted to probate, that she has not been dead seven years, and for aught appellant knows the disposition of said land by her in her will may have been entirely different from that stated in the bill." The complainant (appellee here) answers the cross-bill upon this point as follows: "The will of Martha E. Holdway does not vest title to or any interest in the land in any other person than the aforesaid heirs. A copy of the will is filed herewith marked 'Exhibit E,' and is prayed to be read as a part hereof." The exhibit was filed and no further light is thrown upon the subject of this will, except that there appears in the record, with the objection, a certificate of the clerk of the Circuit Court

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Wise county, made in October, 1916, over three years after the present suit was brought, to the effect "that there is not any will of Martha Holdway of record" in his office.

The uncertainty about the existence of the will, and about its provisions if it does exist, does not constitute such clear defect in the title as to afford the appellant any ground for relief against the payment of the purchase money. From all the indications to be derived from the references to the will in the record, and from the history of the title since the death of Mrs. Holdway, it would seem safe to assume that the provisions of her will, if she made one, were as alleged in the partition suit. Mrs. Holdway had been dead for more than ten years when this suit was brought—more than fourteen years when the decree complained of was rendered. This appears from the fact that some of her heirs conveyed to Hagan in 1902, which of course was after her death. During all the intervening period there has been no suggestion of any claim under a will adverse to those from whom Hagan claims title. The appellant, in his answer, states with emphasis that he did not know of any of the alleged defects in the title until July, 1912. This was more than a year after the date of his deed, and more than a year after the purchase money he had assumed to pay was due. If he had paid this money at maturity, he would have been, as an innocent purchaser, fully protected by section 2547-a of the Code, requiring that wills of real estate, as against such purchasers, must be recorded within seven years after the testator's death. Whether or not he would be so protected now, after having notice of the possibility of such a will, before paying the money, we need not stop to inquire, because under all the circumstances we do not think he has shown that the facts with regard to this alleged will constitute a clear defect in the title.

We pass now to the most serious ground upon which the title is questioned.

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Among the heirs of Mrs. Holdway were, Una Culbertson, a sister, entitled to an undivided sixth interest in the land, and the infant children of Martha Morefield, a deceased niece, entitled to an undivided fifty-fourth interest therein. Both of these interests were sold in the partition suit above mentioned, and were bought in by Patrick Hagan. The appellant contends that both sales were void, and we think this contention is correct. It is not necessary to go at any length into the proceedings under which the sales were made. They were ordered by separate decrees, but were carried into effect by the same deed from Bond, commissioner, to Hagan. At the time of the purchase by Hagan of the interests of Una Culbertson and the Morefield heirs, he had acquired the interests of all the remaining heirs of Martha Holdway, and as a matter of fact no partition was ever actually made in the partition suit. The interest of Una Culbertson was sold pursuant to the prayer of a petition filed in the partition suit by her brother, J. K. Culbertson, who claimed to be her committee. The evidence of his appointment as such was unsatisfactory and the evidence of her insanity wholly insufficient. This latter fact, in itself, constituted a fatal defect in the proceedings by the alleged committee; and, moreover, those proceedings were wholly wanting in some of the jurisdictional requirements of the statute (Code, ch. 117) relating to the sale of lands of persons under disability. The sale, therefore, was void and subject to collateral attack. *Brenham v. Smith*, 120 Va. 30, 90 S. E. 657. By a proper method it would have been entirely within the power of the court in the partition suit to have assigned to Patrick Hagan the entire estate to be partitioned, upon his payment to Una Culbertson of the amount to which she would be entitled for her interest. Code, section 2564. But there was no pretense of compliance with the terms and provisions of the section of the Code just cited (more fully discussed be-

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low), and as that section created and conferred a special statutory jurisdiction upon the court, a failure to comply therewith was fatal to the proceeding. Equity has no inherent jurisdiction to order a sale of land for the purpose of partition. 2 Min. Inst. (4th ed.) 489; *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; 30 Cyc. 267.

It is equally apparent that the sale of the Morefield interest was void. The commissioners appointed in the partition suit to make partition of the land, reported to the court that it would be impossible to lay off the small interest belonging to the Morefield children in such manner as to make it worth as much per acre as the land ought to sell for, and recommended to the court "that the interests of the said infants be sold before any further attempt to partition said land is made." Thereupon the court appointed a commissioner to make sale of this undivided interest, which he did, and Hagan became the purchaser. This sale did not purport to be made in compliance with chapter 117 of the Code; and it was wholly lacking in the essential requisites of a valid sale under the partition statute, section 2564. The latter section provides that "when partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case now pending or hereafter brought, in which partition cannot be conveniently made, if the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, notwithstanding any of those entitled may be an infant or insane person, may order such sale, or such sale and allotment," etc. In this instance, the court might, under proper proof and proceedings, have allotted the whole of the land to Hagan, requiring him to

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pay to the infants such sums as their interests entitled them to receive, but this could only have been done in a general partition scheme, and the record in the partition suit affirmatively shows that there was to be "no further attempt to partition" until after this isolated sale was made. There is no warrant in the statute for thus selling by a public and enforced sale an undivided interest in the estate. It so happened that Hagan became the purchaser and that he finally acquired all the interests in the land, but the statute does not permit one of the parties to acquire the interests of the others in this manner. It is easily apparent that this is not the proper way by which to allot the entire subject "to any party who will accept it and pay therefor to the other parties such sums of money as their interests therein may entitle them to."

Nor was there any authority to make this sale under that branch of the statute which provides for "an allotment of part and a sale of the residue." Here, too, the sale must be made in the execution of a general partition scheme, in which all the parties are given equal consideration. Wherever there is a sale of a part and an allotment of the residue, the part allotted must be divided in kind, and the residue must be sold and the proceeds divided, the division in each case being made among all the parties in interest. *Jackson v. Jackson*, 110 Va. 393, 66 S. E. 721.

Inasmuch, therefore, as the sales of these two interests to Patrick Hagan were, in so far as the record before us discloses, null and void, the defense offered to the instant suit by Roberts was good to that extent, and should have been sustained.

The next question raised by the appellant in regard to the Hagan title rests upon the contention that two certain deeds, dated respectively December 2, 1902, and December 13, 1902, from sundry heirs of Mrs. Holdway to Patrick Hagan, are not in fact absolute conveyances, but are merely

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executory in their nature, and, moreover, if they are absolute conveyances they do not convey a fee simple title to the land. This objection, certainly as to the deed of December 2, 1902, is good, but it is fully met by a later deed, dated June 22, 1906. This latter deed, however, was not recorded until nearly a year after this suit was brought, and makes its first appearance in the record by a guarded stipulation of counsel, made after the case reached this court, which simply files the curative deed in question and shows that it was recorded on July 14, 1914, and that this suit was brought in September of the preceding year. The clear inference from the commissioner's report on the title is that he had not seen or heard of it, for he undertakes to specify the deeds by which Hagan acquired the title, and makes no reference to this one. Whether it was ever brought to the attention of the circuit court the record does not disclose. This deed of June 22, 1906, however, removes what otherwise appeared to be a palpable defect in the title; and as the decree must be reversed on other grounds, the question discussed by counsel as to the effect of this tardy production of the deed on the costs of the suit becomes immaterial.

It was further contained in appellant's cross-bill, and in his petition for appeal, that certain judgments against his immediate grantor, T. G. Wells, constituted liens upon the land, entitling him to relief. The answer to this claim is twofold—first, that no lien or incumbrance created or suffered by Wells could prejudice Hagan's prior lien for the purchase money, and, second, that the record satisfactorily discloses that the judgments in question had been satisfied before this suit was instituted.

The decree must be reversed, and the cause remanded, with directions to the circuit court to allow the appellee a reasonable time, to be prescribed by the court, to perfect the title as to the interests of Una Culbertson and the

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Morefield heirs, and, in the event that this cannot be done in whole or in part, to refer the cause to a commissioner to ascertain what sum would be reasonable and just as a credit to the appellant for the interests as to which the appellee is unable to make good title. *Clarke v. Hardgrove*, 7 Gratt. (48 Va.) 399, 407.

Reversed.

Syllabus.

Staunton.**ROBINETT V. TAYLOR AND OTHERS.**

September 20, 1917.

1. *WILLS—Construction—Presumption Against Intestacy—Case at Bar.*—There is a presumption against partial intestacy. A testator directed that the "Creek Farm," which he described as "the place I now live on," should be rented and the proceeds applied to the support of his wife and two unmarried daughters. After his death he directed that the land be sold to two of his sons, naming them, at the price of \$1,800, but in the event of their not being able to pay for it within a certain time, he directed that the land be sold to the highest bidder, "and the personal * * * that she may have at her death and after our *feunendl* expenses and all other just debts be paid I desire that all the debts that is coming to me now due be collected and the property that may be sold, and all just claims paid that the remainder be equally *devided* among all the heirs" except his daughter M. and his three sons. M. to have two hundred dollars paid to her in a way that her husband could not waste, and the other girls to have "two hundred dollars each in the divide more that the boys all considered."

Held: That the testator intended that his tangible personal property, choses in action and the proceeds of the "property that may be sold" should constitute a fund from which the funeral expenses of himself and wife, and his debts, were to be deducted, and the balance constituted "the remainder" which was to "be equally divided," and, that the testator did not die intestate as to the "Creek Farm" upon which he resided, but that it was included in the words "the property that may be sold" and constituted part of the fund to be equally divided among the heirs, and that the daughter M. took no share in the division of this remainder.

2. *OPTION—Right to Transfer.*—The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to

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two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder.

Held: That the privilege or option given to his two sons was a valuable one, and one which they had the right to transfer.

3. **PROPERTY.**—The word “property” is comprehensive enough to cover real estate as well as personal property.
4. **WITNESSES—Transactions with Decedent.**—A vendee of an interest in a decedent’s estate is an incompetent witness to prove the purchase after the death of the vendor. But the vendee should be given the opportunity of showing what, if any, payments were made by him on the purchase, and be credited by such payments as might be established.
5. **WASTE—Option—Construction of Will.**—The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder, and the proceeds divided among his heirs. Defendant had acquired the option of the two sons to purchase, but as he had also acquired the interests of all the heirs in the estate, although unable to prove the purchase of the share of a deceased heir, he thought there was no necessity for his making an election to purchase under the option.

Held: As the defendant had the right to purchase the land at \$1,800, and in good faith believed he had purchased the share of the deceased heir, the heirs of such deceased heir having not asserted their claim before the institution of the suit, a forfeiture would not be enforced in their favor, but they should be restricted to their share of the \$1,800. The defendant having clearly elected to keep the land at \$1,800, no account should be taken of waste to or timber removed from the land by him.

6. **PLEADING—Title Bond—Proof of Execution.**—Where an answer sets up a title bond as a source of title and files the bond as a part of the answer, the execution and delivery of the title bond not being denied, no other evidence of its execution is necessary under section 3279, Code of 1904.

Appeal from a decree of the Circuit Court of Scott county. Decree for complainant. Defendant appeals.

Reversed.

Statement.

Benjamin B. Taylor, who was the owner of valuable real and personal estate, made a will of which the following is a copy:

"I, Benjamin B. Taylor, being now of sound mind & disposing memory, do make the following as my last will and testament.

"1st. I desire that Hiram H. Taylor my son have the parcel of land contracted to him as the contract will show.

"2nd. I desire that Henry C. Taylor my son have the same land contracted to him, except a small piece on the east end on top of the ridge on the same condition as set forth in the contract with H. C. Taylor and myself except twenty dollars of the purchase money & five bushels of corn per year on the rent.

"3rd. I desire that John D. Taylor have all the land lying between the land sold to Hiram M. Taylor from the top of the North Forks nob to the back side of a large field known as the clover field on the same condition agreed on between said John D. Taylor and myself.

"4th. I desire that Mary Webb the wife of Samuel have a piece of land on the North side of the Big Ridge. Beginning at stake near the N. E. corner of Neri Williams field then a straight line to a stake near the clover field fence thence along the outside of the fence E to a stake at the east end of the fence thence a strait line to 71, 74, Taylor line on top of the fence thence with H. H. Taylor's line to a white oak on or near a lines a peece of land sold by F. G. Martin to R. Dillion thence withe the Dillion line to Neri William's line to the beginning. Now my desire is that Mary Webb have the above named piece of land during her natural life at her death I desire her three boys to have the land, that is, William, Benjamine, & Hiram or those of them that may survive their mother. I desire that the place I now live on be rented and the proceeds be applied to the support of my wife and two daughters, Mahala &

Statement.

Victoria at the death of Malinda Taylor I desire that the lands rented for her support be sold to H. C. & John D. Taylor for the sum of Eighteen Hundred Dollars if they cant pay for the land in two years the time allowed by me for them for it in then the land to be sold to the highest bidder one one and * * * years credit and the personal * * * that she may have at her death and after our *Feunendl* expenses and all other just debts be paid I desire that all the debts that is coming to me now due be collected and the property that may be sold, and all just claims paid that the remainder be equally devided among all the heirs except Mary, Henry C., Hiram & John D. Taylor, Mary to have two hundred dollars paid to her in a way that Samuel Webb her husband cannot *waist* or fool it away the other five girls to wit Mandy, *Marthe*, Malinda M., Mahala & Victoria to have two hundred dollars each in the divide more that the boys all considered.

"I desire that a bay horse and one pided cow one cane mill, one parton plow and one hill side plow, one rifle gun and three hay *stacks* three oat stacks and two hundred bushel of corn be sold on twelve months credit with bond and good freehold security *waiveing* the homestead all house hold & Kitchen furniture to be left with my wife as long as she remains my widow.

"I appoint William H. Taylor and Henry C. Taylor my executors.

"Given under my hand this 27th day of November, 1881.

"B. B. TAYLOR.

Attest:

Jas. P. Carter

J. C. Taylor

Isaac Taylor

"An addition to the foregoing will the farm that I desire to be rented for the support of my wife and two daughters

Statement.

when rented I desire is that they be paid out of what grows on the premises. I desire my widow daughters to have a sufficiency for their support out of the rents and the balance to be sold as other effects there is a yoke of red oxen, one white cow broken horn, two sows and four shoats and all the wheat over twenty bushels I further desire the division line between H. C. Taylor & John D. Taylor on the Creek place to begin at the mouth of the Bottom Spring branch running as and with the fence where it now stands to the South East corner of the old Preston field fence where it now stands thence a *strate* line to the out side fence where it now stands to the middle of the swag between the sink hole out side and the little hollow in side thence with the fence where it now stands to where H. H. Taylor hog pen due south to Robinett's lane, against the lot fence John B. Taylor to have choice of pieces.

"Given under my hand this 13th day of December, 1881."

The testator left surviving him a widow, three sons and six daughters. The widow survived her husband about twenty-nine years and died April 4, 1911. The record does not disclose the value of the personal estate nor what disposition was made of it. There is no controversy over any part of the will except the fourth clause. Nearly three years after the death of the widow, the bill in the present case was filed by some of the heirs of the testator, claiming that the testator had died intestate as to the remainder in the tract of land set apart for the use of the widow and her two unmarried daughters during the life of the widow; that the two sons who had been given the option to take the land at \$1,800 had not exercised their option within the time prescribed by the will, and praying a sale of the land and a distribution of its proceeds amongst the heirs according to their respective rights. The bill also alleged that the appellant, Ira P. Robinett, while a mere tenant of the land,

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had cut and removed from the land timber of the value of ten thousand dollars, for which it was prayed that he should be held accountable.

The appellant answered the bill, denying that the testator had died intestate as to the land aforesaid, which is designated in the proceedings as the "Creek Farm," and claimed to be the owner in fee of said remainder, setting forth in detail his sources of title thereto, and praying that his answer be treated as a cross-bill as to the heirs of Amanda and Lilburn Robinett, and that they be compelled to convey to appellant the legal title to one share in said remainder.

The trial court referred the cause to a commissioner to ascertain what land the testator had directed to be sold, what waste had been committed on the land by the appellant, and the value of the timber cut and removed from the land. The commissioner examined witnesses and reported that the testator had directed to be sold a tract of land known as the "Creek Farm" containing one hundred and twenty-five acres, unless his two sons, H. C. and J. D. Taylor, would take it at \$1,800 within two years after the death of his widow; that no definite amount of waste was shown except the cutting and removal of about 200,000 feet of poplar timber and 75,000 feet of walnut timber; and that appellant had acquired the interest in remainder of all the heirs except Mary Webb and the heirs of H. H. Taylor. Both sides excepted to the report of the commissioner, but all exceptions were overruled, and the court directed the sale of the "Creek Farm," and the division of its proceeds in the proportions of seven-ninths to the appellant, one-ninth to Mary Webb and the remaining one-ninth to E. L. Taylor and W. E. Taylor, heirs of H. H. Taylor, deceased, and referred the cause back to the commissioner to ascertain the quantity and value of the timber cut and removed from the land by the appellant, declaring that the value of

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the timber should be divided among the same parties and in the same proportion as the proceeds of the sale of the land aforesaid. From this decree Ira P. Robinett appealed.

S. H. Bond and Coleman & Carter, for the appellant.

W. S. Cox, for the appellees.

BURKS, J., (after making the foregoing statement) delivered the opinion of the court.

The decision of the controversy between the parties to this litigation depends largely upon the proper construction of the fourth clause of the testator's will, which is set forth in the statement of facts. The presumption is against partial intestacy (*Prison Association v. Russell*, 103 Va. 563, 49 S. E. 966; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650), and we are of opinion that the testator did not die intestate as to the "Creek Farm." By the fourth clause of the will, the testator directed that the "Creek Farm," which he describes as "the place I now live on," be rented and the proceeds applied to the support of his wife and two unmarried daughters. After the death of his wife, he directs that the land be sold to his two sons, H. C. and J. D. Taylor, at the price of eighteen hundred dollars, but "if they can't pay for it in two years the land is to be sold to the highest bidder * * * and the personal * * * that she may have at her death and after our *Feunendl* expenses and all other just debts be paid I desire that all the debts that is coming to me now due be collected and the property that may be sold, and all just claims paid that the remainder be equally divided among all the heirs except Mary, Henry C., Hiram & John D. Taylor, Mary to have two hundred dollars paid to her in a way that Samuel Webb her husband cannot *waist* or fool it away the other five girls, towit, Mandy, *Marthe*, Malinda M., Mahala & Victoria to have two hun-

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dred dollars each in the divide more that the boys all **considered.**" The privilege or option given to his two sons **was** a valuable one, and one they had the right to transfer **and** which they did transfer, and the same was acquired by the appellant, Ira P. Robinett.

The word "property" is one of the most comprehensive that could have been used in this connection and is **certainly** comprehensive enough to cover real estate as well as personal property. We are of opinion that the testator intended that his tangible personal property, choses in action and the proceeds of the "property that may be sold" should constitute a fund from which the funeral expenses of himself and wife, and his debts, were to be deducted, and the balance constituted "the remainder" which was to "be equally divided." The blank left after the word "personal" was manifestly intended to be filled by the word "property." He then mentions debts due him, and follows this with, "the property that may be sold." He had already directed the sale of the land and it was the only property he had thus far in his will directed to be sold. It would seem, therefore, as he had specifically mentioned "personal property" and had directed the sale of the land, he meant that the fund which was to be "equally divided" should be constituted as above mentioned.

It remains to be seen how this fund was to be divided. The testator directs that "the remainder be equally divided among all the heirs except Mary, Henry C., Hiram and John D. Taylor." As to Mary, he directs that she shall "have two hundred dollars paid to her in a way that Samuel Webb, her husband, cannot waste or fool it away." Mary is not thereafter mentioned. If it was intended that she should share any further in the division of this "remainder," it is rather remarkable that this too should not have been so secured that her husband could not "waste or fool it

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away." The testator had by the same clause of his will given her a valuable tract of land, and we are of opinion that the two hundred dollars was the only additional provision intended to be made for her, and as this sum has already been paid to her, she no longer has any interest in the subject of controversy.

As to the shares of the sons, the testator provides that the five daughters named shall "have two hundred dollars each in the divide more than the boys all considered." The appellant has acquired the shares of all the sons and daughters in this remainder except one share owned by the two sons of H. H. Taylor. The appellant testified that he also bought and paid for this share, but produces no deed therefor, and he is an incompetent witness to prove the purchase as H. H. Taylor is dead. He files, however, the note of himself and wife to H. H. Taylor for fifty dollars in which it is stated that the fifty dollars is the "balance of one hundred and fifty dollars for his entire interest in the B. B. Taylor Creek Farm. When this note is paid said Taylor is to make his deed to the land." This note it is true is not signed by H. H. Taylor, nor does it appear otherwise than by the testimony of the appellant that it was ever accepted by or paid to H. H. Taylor. But appellant should be given the opportunity of showing what, if any, payments were made by him on the purchase aforesaid, and be credited by such payments as may be established.

The appellant testifies, and such seems to be the fact, that at the time of the removal of the timber from the land he had purchased the interest of the heirs of B. B. Taylor in the land known as the "Creek Farm," although he may not be able to prove the purchase of the share of H. H. Taylor. The appellant, as the assignee of the two sons, had the right to purchase the land at \$1,800, at any time within two years after the death of his widow, but he had already purchased the interests of all the parties except the share

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of H. H. Taylor, and he in good faith believed he had purchased this, and there was no necessity for his making an election to purchase. If he was mistaken as to this share, it would be inequitable and unjust to enforce a forfeiture in favor of the holders of this share. As the appellant had the right to purchase the land at \$1,800, and in good faith believed he had purchased the share of H. H. Taylor, and it does not appear that the heirs of the latter made any demand or asserted any claim to an interest in the land prior to the institution of this suit, it seems but fair and right that they should be restricted to their share of the \$1,800. As Mary Webb is excluded, this share would be one-eighth of eighteen hundred dollars, or \$225, subject to credit for any payments which may be shown to have been made thereon. The appellant having clearly elected to keep the land at \$1,800, no account should be taken of waste done to or timber removed from the land.

It is assigned as cross-error that the trial court held that the appellant was the owner of the share of Amanda Robinett, as the only evidence of the title was the contract or title bond of Amanda Robinett which was not proved except by the testimony of the appellant, who was an incompetent witness because Amanda Robinett was dead. The answer of the appellant, which was prayed to be treated as a cross-bill as to the heirs of Amanda Robinett, sets up this title bond as a source of title and files the bond as a part of the answer. The execution and delivery of the title bond was never denied by the heirs, and no other evidence of its execution was necessary. Code, section 3279. Except as herein otherwise stated, the parties appear to have been paid the prices agreed upon for their respective interests in the remainder of the estate and the appellant to have acquired title thereto.

Section 2858 of the Code, relating to the acceptance of part performance of a contract in discharge of the contract,

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has been invoked by counsel for the appellees, on the ground that, as the sons did not take the land at \$1,800, it will have to be sold and will bring \$6,000; that the sales to the appellant were made on condition that the sons took the land at \$1,800, and the condition not having been fulfilled, the land should be sold and all of the heirs be allowed to share in the proceeds and account to the appellant for what he had paid them, with interest. No such condition appears in the deeds or contracts, and we are unable to perceive any applicability of the section of the Code mentioned.

Upon the whole case, we are of opinion that the trial court erred in holding that the appellee, Mary Webb, had any interest in the subject of controversy in this case, and also in decreeing a sale of the "Creek Farm" and referring the case back to the commissioner to take an account of the quantity and value of the timber cut by the appellant. As to the share of the heirs of H. H. Taylor in the "Creek Farm," further inquiry should be made to ascertain whether or not the appellant had become the purchaser thereof, and, if so, at what price and the balance, if any, due thereon, and, if not, they should be allowed to subject the "Creek Farm" to the payment of \$225, with interest thereon from the 4th day of April, 1913, subject to credit for any payments which may be shown to have been made thereon. Upon payment of this sum, or if there was a sale of the interest of H. H. Taylor in the farm, then upon the payment of the balance, if any, of the purchase money, the circuit court should direct a deed to be made to the appellant of the "Creek Farm."

Reversed.

Statement.

Staunton.

SCHOOL BOARD OF LIPPS DISTRICT NO. 4 OF WISE COUNTY
V. SAXON LIME AND LUMBER COMPANY.

September 20, 1917.

1. IMPLIED CONTRACTS—*Material Used*.—A school board contracted for the construction of a school building. The contractor entered into a contract with the plaintiff to furnish a certain part of the building material for a certain sum. Before the material was delivered the contractor became bankrupt and refused to receive it. Plaintiff then notified the carrier's agent to hold the shipments and not to deliver to any one except upon a written order. Notwithstanding this notice, the carrier delivered the material to an agent of the trustee in bankruptcy of the contractor, who contemplated the completion of the contract with the school board. But the trustee abandoned this idea and so notified the parties in interest, relinquishing his claim for the materials; whereupon the school board proceeded itself to complete the building, using the material in question, with knowledge of all the facts. There was evidence indicating an express promise to pay for the material by the school board, but however that might be, the law will imply a promise by the board to pay for the building materials used. The plaintiff's right to recovery did not depend upon the exercise of the right of stoppage *in transitu*.

Error to a judgment of the Circuit Court of Wise county, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Bond & Bruce, for the plaintiff in error.

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Vicars & Peery, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This case arises out of this state of facts: The School Board of Lipps District No. 4 of Wise county, hereinafter called the School Board, entered into a contract with one David J. Phipps for the construction of a school building in the town of Coeburn. Phipps, to whom the plans and specifications had been furnished, entered into a contract with the Saxon Lime and Lumber Company, hereinafter called the plaintiff, for furnishing a certain part of the building material known as mill work, for the sum of \$1,345, delivered at Coeburn, freight prepaid. Before all of this mill work material was delivered to Phipps he became a bankrupt. On August 28, 1913, the very day upon which he filed his petition in bankruptcy, the plaintiff shipped a large part of the material from its place of business at Bluefield, W. Va., and the rest of the material here involved on the next day. Phipps either failed or refused to receive the shipments when they arrived at Coeburn, and the agent of the railway company at Bluefield, having notified the plaintiff thereof, the plaintiff notified such agent to hold the shipments and not to deliver to any one except upon a written order. Notwithstanding this order not to deliver these shipments, the railway company thereafter delivered them at Coeburn to J. W. Smoot, who was acting as the agent for W. E. Barrett, trustee in bankruptcy for Phipps. At that time Barrett contemplated taking upon himself the completion of the contract with the School Board and assuming Phipps' obligations with reference thereto. Smoot, the agent of Barrett, testified that he unloaded it "by the order of Barrett, trustee, with the understanding that he would see that the Saxon Lime and Lumber Company were paid for the lumber." After that time

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Barrett, trustee, abandoned his idea of completing the construction of the building, and so notified the parties in interest, and expressly relinquished his previously asserted claim to such materials; whereupon the School Board proceeded itself to complete the building. It used the materials contained in the shipments of August 28th and 29th, which had been placed by Smoot, as the agent of Barrett, trustee, within the uncompleted school building.

By letter of October 6, 1913, the School Board, by J. D. Clay, Jr., chairman, wrote the plaintiff, stating, among other things, that "the bill of material in question was turned over to us by Mr. W. E. Barrett, receiver for D. J. Phipps, and he has asked us to either account to him for same or hold the funds subject to the order of the court." He further says: "* * * as the matter now stands the rights of property will have to be tried in the courts and when in whom equity exists is decided, the School Board will not try to evade payment of the bill."

On October 15, 1913, the attorney for the trustee wired the Saxon Lime and Lumber Company relinquishing all claim to the property delivered to the railway company on August 28th and thereafter.

Mr. J. N. Hillman, superintendent of schools of Wise county, on November 6th, and by authority of the School Board, in response to a request for settlement, wrote the plaintiff indicating a readiness to pay just as soon as he was satisfied the invoice was correct.

There was other correspondence, but what has been referred to is sufficient to show the conditions under which the material was used by the School Board in the construction of the school building. Having failed to secure settlement, the plaintiff instituted its action in assumpsit against the School Board and the bankrupt's estate.

The defense is based upon the idea that the School Board succeeded to Phipps' rights and could claim the benefit of

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his contract with the plaintiff, without assuming its obligation. There are several exceptions to the refusal of the court to admit evidence as to the previous transactions between Phipps and the lumber company. In our view the uncontradicted facts show that even if the rejected evidence had been admitted, it presents no defense to the action. Inasmuch as Phipps himself declined to receive the material here involved, because his title thereto had become vested in his trustee in bankruptcy, and the trustee, though he received it from the transportation company, afterwards surrendered all claims thereto, and the School Board, knowing of all these facts, appropriated and used the material involved, the law will imply a promise to pay therefor. Moreover, there is evidence in the case indicating an express promise to pay by those claiming to represent the School Board.

There is some discussion of the right of stoppage *in transitu*, and the claim is made that under the circumstances the plaintiff could not exercise that right. The answer to this is that the plaintiff's right to recovery does not depend upon the exercise of that right. The School Board having used the building material which, when refused by the trustee in bankruptcy, reverted to the plaintiff, should pay for it.

The verdict of the jury in favor of the plaintiff was the only verdict which could properly have been found.

It is probable that this controversy would not have arisen but for the fact that Phipps, the bankrupt, had given bond to the School Board for the performance of his contract to complete the building, and they were cautioned not to do anything which might be construed to release the bonding company, the surety on that bond.

The judgment will be affirmed.

Affirmed.

Syllabus.

Staunton.

SHANKLE V. SPAHR.

September 20, 1917.

1. GIFTS—*Causa Mortis*—*Policy of the Law*.—The rules of law on the subject of gifts *causa mortis* are well settled. If such a gift falls within those rules, it is the duty of the courts to sustain it, but, for reasons of public policy, such rules should not be extended or relaxed.
2. GIFTS—*Executory Gifts*.—Only executed parol gifts, whether *inter vivos* or *causa mortis*, are valid. Such gifts, if executory, being without consideration to support them, are invalid.
3. GIFTS—*Causa Mortis*—*Delivery of Possession*.—Delivery of possession of the subject of the gift by the donor, in his lifetime, is essential to the execution of a gift *causa mortis*.
4. GIFTS—*Causa Mortis*—*Delivery of Possession*—*Case at Bar*—*Constructive Delivery*.—The subject of the alleged gift in the instant case was gold coin—tangible personal property. It was not too ponderous for manual delivery and hence such delivery could not be dispensed with under the rule established by the decisions applicable to personal property of that character. There was no delivery of the means of getting possession and enjoyment of the thing, hence there was no constructive delivery in the instant case. The information given by the donor to the donee of the secret place of hiding of the gold does not come within the rule established by the decisions defining what amounts to constructive delivery. To constitute constructive delivery, it is essential that there should be a physical delivery of some tangible object which may serve as the means of getting possession and enjoyment of the subject of the gift.
5. GIFTS—*Words of Present Gift*.—All gifts, whether *inter vivos* or *causa mortis*, are gifts *in praesenti*. There must be words of present gift as well as delivery. The one without the other is insufficient. Though there be actual delivery, yet if the words of gift accompanying the delivery indicate an intention on the part of the donor not to confer on the donee the power

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of taking physical possession of the thing *until the donor's death*, then the proceeding is an abortive testamentary act and not a gift.

6. **GIFTS—Delivery—Acquiescence in Possession.**—In gifts *inter vivos* acquiescence of a donor, after words of donation, in a previously acquired possession of the donee, has been held to be sufficient evidence from which to imply a delivery of the possession by the donor to the donee as such; but this relaxation of the rule with respect to delivery of possession in cases of gifts *inter vivos* has never been extended to gifts *causa mortis* in Virginia, nor, by the great weight of authority, elsewhere.

Error to a judgment of the Circuit Court of Washington county, in an action of trover. Judgment for defendant. Plaintiff assigns error.

Reversed.

In this action of trespass on the case in trover and conversion the plaintiff in error was the plaintiff and the defendant in error was the defendant in the court below, hereinafter referred to as plaintiff and defendant.

The evidence in the case was as follows:

The plaintiff to maintain the issue on his part testified as a witness for himself, as follows:

"That he was the executor of the estate of Mary J. Steele, deceased, under her will dated February 28, 1911, codicil to the will dated May 26, 1914; that Mary J. Steele was an old lady and a widow living by herself, except that her maiden sister, Nancy Spahr, lived in the house with her. That she lived on a farm in the lower end of Washington county, about three or four miles from his farm and that occasionally he attended to Mrs. Steele's business, such as taking her money to Bristol for deposit in the bank. That in February, 1915, he went to Mrs. Steele's house to get some money that had been paid her the day before and he said to her in the presence of Cordie Ringley, a white girl hired by Mrs. Steele to wait upon her and do her cooking, 'Aunt

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Mary, why don't you deposit your gold in the bank? The bank will pay back to you money in gold if you ever want it.' Cordie Ringley spoke up and said, 'Why, I didn't know there was any gold here,' to which he replied, 'Yes, Aunt Mary has got \$450.00 in gold.' Mrs. Steele then spoke up and said, 'No, Shankle, you are wrong. I have got \$350.00 in gold.' And turning to Cordie she said, 'Go and look between the chimneys and bring that coffee pot in here. *The gold is wrapped up in a flannel rag and is in the pot.*' Cordie went out and came back with two coffee pots and turned them up and one of them was empty and the other had in it only a flannel rag. Mrs. Steele seemed to be very much worried that the gold was not there and he said to her, 'Don't worry about that, Aunt Mary, I expect some one has taken the gold for safe keeping and you will find it, but if you don't you have got enough to live on any way,' and Cordie seemed to be worried also because she was afraid that she might be accused of taking the gold. The next time he went back to Mrs. Steele's house, which was within a week or so afterwards, Cordie told him that Mrs. Ritta F. Spahr had gotten the gold. Mrs. Steele died in August following the occurrence mentioned above. The witness was then asked this question: 'After the death of Mrs. Steele, did you make demand on Ritta F. Spahr for the gold?' Answer, 'I did.' 'Did Mrs. Spahr refuse to give you the gold?' Answer, 'She did.' On being recalled to the stand witness said that in a conversation with Mrs. Steele years before her death she had told him about having this gold and said that she wanted it to go to the Steele heirs and after the occurrence referred to above as having taken place in February, 1915, she again told him in the presence of Cordie Ringley that she wanted that gold to go to the Steele heirs."

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And further to maintain the issue on his part, the plaintiff introduced Miss Cordie Ringley, who testified as follows:

"That she was hired by Mrs. Steele to wait on her and cook for her in January, 1915, after Mrs. Steele had received a stroke of paralysis. That on the 22nd day of February, Mr. W. K. Shankle came to the house and got some money that Mrs. Steele had received the day before that to deposit it in the bank and that he said to her, 'Why don't you let me deposit your gold?' and that she, Cordie, spoke up and said, 'I did not know that there was any gold in the house?' and Mr. Shankle said, 'Yes, Aunt Mary has got \$450.00 in gold,' and that Mrs. Steele said, 'No, Shankle, I have only got \$350.00 in gold,' and she then told me to go out and bring in a coffee pot that I would find between the chimneys which I did. I found two coffee pots and brought them both in and emptied their contents on the floor, one of them being empty and the other had nothing in it but an old flannel rag. Mr. Shankle then said to Mrs. Steele not to worry that probably some one had taken the gold for safe keeping. I was very much worried because I was afraid I would be accused of having taken the gold. The next morning when Mrs. Ritta F. Spahr came over to the house I said to her, 'Someone has taken Aunt Mary's gold,' and she said to me, 'Well don't worry about that, I have got the gold,' and afterwards she told me that Mrs. Steele had given her the gold but that she was not to take it away until she saw the end was near."

These were the only witnesses called for the plaintiff.

DEFENDANT'S TESTIMONY.

To maintain the issue on her part the defendant, over the objection of the plaintiff, was sworn as a witness and testified as follows:

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"That she was the niece by marriage, of Mrs. Mary Steele, and that she had stayed with Mrs. Steele for quite a number of years when she (Mrs. Spahr) was a young girl; that Mrs. Steele had lived with her husband in Illinois a number of years after their marriage and that she had returned to this country some twenty-five years ago, and that since that time, she (Mrs. Spahr), has looked after Mrs. Steele when she was ill, and waited upon her, and that she was with her a good deal of the time; that her relation to Mrs. Steele was very much like that of a daughter. That up to Mrs. Steele's illness, during late years, she has been with her more, than prior to that time; that Mrs. Steele lived in one end of a double log house, and Nancy Spahr, Mrs. Steele's sister, lived in the other end; that Mrs. Steele was about eighty years old when she died, and Nancy Spahr about 90, at the present time. That there was a chimney between these double houses, and that on one side of the house there was a door to this opening, next to the chimney, and it was used to store sweet potatoes in. That in October, 1914, she and Mrs. Steele were at this potato hole about the time sweet potatoes were put away, and that Mrs. Steele told her to climb up and see if 'that coffee pot there is heavy.' Mrs. Spahr then climbed up within reach of a certain shelf where the coffee pot was, that was pointed out by Mrs. Steele, and took it down, saying, 'Yes, it is heavy.' Mrs. Steele then said, 'Ritta, when you see the end approaching, and that I am passing away, I want you to take this coffee pot for you will have to look after Nancy when I am gone, and you will need the gold.'

"Mrs. Spahr then set the coffee pot back on the shelf, and nothing more was said about it, nor did she examine its contents until some time in February following, when she was called to the bedside of her aunt, Mary Steele; that Mrs. Steele had had a stroke of paralysis and that she was seriously ill at the time and that some time during that

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night, while she (Mrs. Spahr), was at the bed of Mrs. Steele, Mrs. Steele looked up at her and said, 'I am passing away, go get it,' at the same time waiving her * * * and pointing to the chimney and that part of the house where the coffee pot was located.

"That a very short time after this she (Mrs. Spahr) went to the potato hole, got the coffee pot and took it into the other part of the house where Aunt Nancy lived, and where Zeb Spahr, Ritta Spahr's son, lived with her Aunt Nancy, and there gave it to Zeb Spahr, where he, together with herself, took the coffee pot to his room, and that he there counted the gold and found it to be \$220.00, and he thereupon put it in his bureau drawer and locked it up."

"That a few days after she and her son Zeb Spahr, took the coffee pot down to her home and there put it in Zeb Spahr's trunk, which was the only place she had to lock it up, and that a short time after this Isaac Spahr, another son of Mrs. Ritta Spahr, who had been attending school at King College, returned home and brought with him his trunk, which she thought had a better lock on it than Zeb Spahr's trunk, and that the suggestion was made that the coffee pot and its contents be put in Isaac Spahr's trunk, and that thereupon it was removed from Zeb Spahr's trunk and Isaac Spahr and Zeb Spahr and Mrs. Spahr herself, counted the gold and found it to be \$220.00. Then it was put in Isaac Spahr's trunk and locked up.

"That after Mrs. Ritta Spahr and her son Zeb had taken the gold home, she went to see her Aunt Mary Steele one afternoon and while there Mrs. Steele asked her 'Ritta, what became of the coffee pot.' Mrs. Ritta Spahr replied 'It is safe. I took it home with me.' Mrs. Steele then said 'That is all right' and Mrs. Spahr said to Mrs. Steele 'What if King Shankle asks about it.' Mrs. Steele replied, 'Tell Shankle it is none of his business.'"

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(The defendant produced the coffee pot and exhibited the same before the jury, showing just how the gold was wrapped in flannel, just as it was when she first saw it. Showing that it was wrapped in tissue paper, then in a small piece of flannel around which was wrapped a still larger piece, and then it was laid between two other larger pieces of flannel, in the coffee pot, and the whole amount thus exhibited was \$220.00).

Mrs. Ritta Spahr stated further "that Mrs. Steele left her a tract of land under her will, and also left some bequests to her children, and that her (Mrs. Spahr's) home was only a very short distance from Mrs. Steele's home, and that Mrs. Steele was always called upon when she was in trouble, or needed attention. That Aunt Nancy is very feeble now and I am living in the house with her and waiting upon her, and caring for her the best that I know how. She had some land, I don't know exactly how much. I think about forty acres.' Mrs. Spahr further testified that Mrs. Steele never after this time recovered from this illness but that she continued to be very weak from the time she told Mrs. Spahr to 'go and get' the gold, continuously until her death, about the 20th of August, 1915. That she did, at that time, have a stroke of paralysis and this continued until the time of her death and that nothing was ever said after her conversation with Mrs. Steele subsequent to the visit of King Shankle, about the gold, and that Mrs. Steele had to have assistance when she wanted to move in her bed, during this time."

There was a trial by jury and verdict for the defendant, which the plaintiff moved the court to set aside, because contrary to the law and the evidence; and for other reasons covered by the assignments of error. This motion was overruled and the judgment complained of was entered in accordance with said verdict.

Statement.

Considering the evidence under the rule applicable thereto in this court, we find the following to be the material facts upon the question which, in the view we take of it, is decisive of the case.

THE FACTS.

The words of donation were the following: "Ritta, when you see the end approaching and I am passing away, I want you to take this coffee pot for you will have to look after Nancy when I am gone and you will need the gold." There were no subsequent words of donation.

In accordance with the words of donation, possession of the subject of the gift was not to be delivered to the donee until the donor was *in articulo mortis*—that is to say, such possession was not to be delivered in the lifetime of the donor but at her death, and at a time when it was not to be expected that the donor could be physically capable of herself delivering such possession, hence the donee was to then *take* such possession. Accordingly, the delivery of possession of the subject of the gift relied on by the defendant occurred as follows: When the donor thought her death was at hand, she looked up to the donee and said: "I am passing away, go get it," at the same time waiving her * * *, (supposedly her arm or hand) "and pointing to the chimney and that part of the house where the coffee pot was located." This was all the donor did towards delivering the possession aforesaid. It was not completed by the donor. The donee subsequently completed the tradition of such possession by taking the possession. There is no evidence that the donor was then conscious of what was occurring; on the contrary, the evidence for the defendant shows that she was not. The possession of the subject of the gift, therefore, was not delivered by the donor, but taken by the donee.

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It later developed that the donor was not *in articulo mortis*, as she supposed at the time she directed the donee to take said possession, so that in fact the latter obtained the possession before she was entitled to it in accordance with the words of donation. On being informed of such possession, the donor acquiesced in it thereafter for some six months, until her death in fact occurred; but she uttered no further words of donation, and during this time the donee had no right to the possession of the subject of the gift save for safekeeping, and did not become the donee of it until the donor did in fact arrive at the end of her life. That is to say, the fact in the instant case is, that the title of the defendant to the subject of the gift rests upon the words of donation aforesaid, not perfected by any delivery of possession thereof made by the donor in her lifetime.

S. V. Fulkerson and *N. P. Oglesby*, for the plaintiff in error.

Jno. W. Price and *Frank W. DeFriece*, for the defendant in error.

SIMS, J., (after making the foregoing statement) delivered the opinion of the court.

In the view we take of the case it will be necessary for us to decide only one question raised by the assignments of error, namely:

1. Was there such delivery of possession of the subject of the gift in the instant case as to make a valid gift *causa mortis*?

The rules of law on the subject of gifts *causa mortis* are now well settled by the authorities. If such a gift falls within those rules, it is the duty of the courts to sustain it,

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but, for reasons of public policy which have been too often stated to need restatement here, such rules should not be extended or relaxed.

Only executed parol gifts, whether *inter vivos* or *causa mortis*, are valid. Such gifts, if executory, being without consideration to support them, are invalid.

Delivery of possession of the subject of the gift by the donor, in his lifetime, is essential to the execution of a gift *causa mortis*.

As said by Judge Baldwin in delivering his opinion in the case of *Miller v. Jeffries*, 4 Gratt. (45 Va.) 472: "A *donatio mortis causa* is of a mixed character, being partly testamentary and partly donative from an indulgence to the nature of the emergency the law dispenses with the solemnities of a testament; and for that very reason requires the essentials of a gift. A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or ring, or of the means of getting possession and enjoyment of the thing, as of the key of a trunk, or of a warehouse where the subject of the gift is deposited; or, if the thing be in action, of the instrument by using which the chose is to be reduced into possession, as a bond, or a receipt or the like. * * *

"It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better."

See also, to same effect, and also as bearing on the propositions of law hereinafter stated, the learned and able article of Prof. Graves on the subject of "Gifts of Personality," 1 Va. Law Reg. 871, *et seq*; *Ward v. Turner*, 2 Ves. Sr. 431, 1 Lead. Cas. in Eq., p. 1205 and note; *Seabright v.*

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Seabright, 28 W. Va. 471; *Ewing v. Ewing*, 2 Leigh (29 Va.) 343, *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Gano v. Fisk*, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819; 2 Gratt. Va. Rep. Ann., note on "Gifts," bottom pp. 393, 400; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Cutting v. Gilman*, 41 N. H. 147; *Bunn v. Markham*, 7 Taunt. 224; note to *Spratley v. Wilson*, 1 Holt 10, at pp. 12 and 13; *McCord's Adm'r v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Case v. Dennison*, 9 R. I. 88, 11 Am. Rep. 222; *Basket v. Hassel*, 107 U. S. 610, 2 Sup. Ct. 415, 27 L. Ed. 500.

The subject of the alleged gift in the instant case was gold coin—tangible personal property. It was not too ponderous for manual delivery and hence such delivery could not be dispensed with under the rule established by the decisions applicable to personal property of that character. There was no delivery of the means of getting possession and enjoyment of the thing, hence there was no constructive delivery in the instant case. The information given by the donor to the donee of the secret place of hiding of the gold does not come within the rule established by the decisions defining what amounts to constructive delivery. To constitute constructive delivery it is essential that there should be a physical delivery of some tangible object which may serve as the means of getting possession and enjoyment of the subject of the gift.

Therefore, the delivery of possession relied on by the defendant in the instant case, to be valid, must have been an actual delivery of possession of the subject of the gift to the donee by the donor in her lifetime.

As we have seen from the statement of facts above, the alleged donor did not herself complete the act of making such delivery of possession in her lifetime. Moreover, as stated by Judge Burks in his learned and able brief in the case of *Thomas v. Lewis*, *supra* (which by general consent

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has come to have the force of authority on this subject) "All gifts, whether *inter vivos* or *causa mortis*, are gifts *in praesenti*. There must be words of *present* gift as well as delivery. The one without the other is insufficient. Though there be actual delivery, yet if the words of gift accompanying the delivery indicate an intention on the part of the donor not to confer on the donee the power of taking physical possession of the thing *until the donor's death*, then the proceeding is an abortive testamentary act and not a gift. *Basket v. Hassel*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, is an illustration and authority in point."

The case of *Basket v. Hassel* sustains this position, certainly with respect to gifts *causa mortis*.

As we have seen from the above statement of facts, in the instant case, the words of donation—"the words of gift"—expressed the intention on the part of the alleged donor not to confer on the alleged donee the power of taking physical possession of the thing until the donor's death. The proceeding was, therefore, "an abortive testamentary act and not a gift."

The acquiescence of the alleged donor in the instant case in the possession of the defendant, acquired by authority of the former, it is true, but under a mistake as to the time of donation having arrived, without other words of donation giving the donee the power to take physical possession of the thing *as donee*, until the donor's death, was but an acquiescence in a possession acquired previous to the time fixed therefor by the words of gift, and was, in principle, "a previous and continuing possession * * * by the authority of the donor," which, as firmly established by the authorities, is insufficient to validate a gift *causa mortis*.

It is true that in gifts *inter vivos* acquiescence of a donor, after words of donation, in a previously acquired possession of the donee, has been held to be sufficient evidence from which to imply a delivery of the possession by the

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donor to the donee as such; but this relaxation of the rule with respect to delivery of possession in cases of *gift inter vivos* has never been extended to gifts *causa mortis* in Virginia, nor, by the great weight of authority, elsewhere. In this particular, and in some others not necessary to refer to here, the rule, stated generally, that the same delivery of possession of the subject of the gift which suffices to validate gifts *inter vivos* will suffice to validate gifts *causa mortis*, is subject to qualification. In the instant case, however, there was no possession of the subject of the gift acquired before the words of donation, and none acquired after such words in accordance therewith.

The proof in the instant case amply establishes the intent of the alleged donor to make the gift, and we wish to say of the foregoing conclusions, as was said by Lewis, P., in the case of *Yancy v. Field*, 85 Va., at p. 758, 8 S. E. at p. 721: They have "been reached not without reluctance. Had we the authority to execute the alleged gift, or, in other words, to give effect to the manifest intention of the decedent to aid" (the defendant), "the court would without hesitation affirm" (the judgment). "But we have no such authority. Our province is not to make law, but to administer it, and we must, therefore, decide this case according to the settled law as it is written, and not permit a hard case to make bad law."

For the foregoing reasons, we are constrained to the opinion that there was error in the action of the trial court and judgment complained of, and hence such judgment must be set aside and annulled and a new trial granted, to be had, if the plaintiff is so advised, not in conflict with this opinion.

Reversed.

Syllabus.

Staunton

STEINMAN V. CLINCHFIELD COAL CORPORATION.

September 20, 1917.

Absent, Sims, J.

1. **RES JUDICATA—Final Judgment.**—In order for a judgment to constitute *res judicata*, it must be a final judgment in the case on the merits.
2. **RES JUDICATA—Final Judgment.**—A judgment of the United States Circuit Court of Appeals which remanded the case to the district court "for further proceedings in accordance with the views herein expressed," is not a final judgment.
3. **RES JUDICATA—Final Judgment—Remand.**—A reversal in a court of last resort *remanding a cause*, cannot be set up as a bar to a subsequent action for the same cause.
4. **RES JUDICATA—Stare Decisis—"Law of the Case."**—Closely akin to the doctrine of *res judicata* is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own, though it is at times confused with one or the other of the other two.
5. **"LAW OF THE CASE"—Statement of the Doctrine—Final Judgment.**—Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final.
6. **"LAW OF THE CASE"—Adjudication of Questions Involved.**—The doctrine of the "law of the case," as stated in the preceding syllabus, applies where the question raised on the second appeal was necessarily involved in the first appeal, whether actually adjudicated or not.

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7. "LAW OF THE CASE"—*Subsequent Litigation Between Other Parties*.—The doctrine of the "law of the case" presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases as a precedent.
8. "LAW OF THE CASE"—*Different Facts*.—The doctrine of the "law of the case" can only be invoked where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts.
9. "LAW OF THE CASE"—*Jurisdiction of Court in First Case—Res Judicata*.—Sometimes even between the same parties and relating to the construction of the same instrument, the first judgment is neither *res judicata*, nor the "law of the case." It must appear not only that the question was the same in both cases, but that the court in the first suit had power and jurisdiction to determine the question.
10. "LAW OF THE CASE"—*Different Parties—Stare Decisis*.—If the parties are different, though the question be the same, the case is controlled by the rule of *stare decisis*, and the doctrine of "the law of the case" has no application.
11. "LAW OF THE CASE"—*Court of Foreign Jurisdiction*.—The doctrine of the "law of the case" does not apply to a former decision, in unended litigation, by a court of a foreign jurisdiction. Consequently, a judgment of the United States Circuit Court of Appeals remanding the case for a new trial is not, where plaintiff took a nonsuit and brought his action for the same cause in the State court, the law of the case in the latter action.
12. RECORDING ACTS—*Section 2465, Code of 1904—Purchaser for Value and Without Notice—Fair and Adequate Consideration*.—Under section 2465, Code of 1904, an unrecorded deed is void as to a subsequent purchaser for value and without notice, and to constitute a purchaser for value in this State, it is not required that the consideration should be either fair or adequate, as is required in some States, but simply that the purchase should be for value; and even where adequate consideration is required it has been held that "no consideration of

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any value at all, upon which parties capable of contracting with each other, and in the absence of fraud, may agree, can be said, in a legal sense, to be inadequate."

13. **RECORDING ACTS—*Purchaser for Value—Burden of Proof.***—Plaintiff claimed to be a purchaser for value without notice of a prior deed, under which defendant claimed. Defendant attempted to show that even if the plaintiff was a purchaser for value, he was a purchaser with notice of the defendant's title.

Held: That the burden was upon the plaintiff to show that he was a purchaser for value, and that the purchase price had been actually paid before notice of the defendant's title; and that the burden of showing notice rested upon the defendant.

14. **NOTICE—*Constructive Notice—Agency—Bona Fide Purchaser.***—Notice to an agent of a party is constructive and not actual notice to the principal. But where one claims as purchaser for value without notice, it is immaterial whether the notice was actual or constructive.

15. **SECTION 2510, CODE OF 1904—*Suit For the Recovery of Land.***—A suit to subject land to the payment of a judgment is not a suit for the recovery of land, and section 2510 of the Code of 1904, providing for the record of any recovery of land under judgment or decree, has no application to the decree rendered therein.

16. **JUDGMENTS AND DECREES—*Binding Upon Parties and Privies.***—Parties to judgments and decrees, and their privies, are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself.

17. **PRIVIES—*Judgments and Decrees.***—One who has succeeded to the right, title or interest of another in real estate is a privy in estate, and is bound by judgments and decrees against his grantor. The judgment disposes of the rights of the parties and is a matter of public record. Its effect cannot be impaired by any subsequent transfer by the defendant. This must of necessity be true. There would be no end of litigation if the effect of a judgment or decree could be avoided by a simple transfer of the property by the unsuccessful litigant as soon as an adverse judgment or decree was rendered. Decrees are rendered every day construing contracts, deeds, wills and other documents, and such decrees bind not only the parties to the litigation, but all persons claiming under them, with or without notice of the decree. The privies can stand on no higher footing than their principals.

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18. JUDGMENTS AND DECREES—*Privies—Necessary or Proper Parties.*—Judgments bind the actual parties to the suit, whether they were necessary parties or simply proper parties.
19. JUDGMENTS AND DECREES—*Necessary or Proper Parties.*—In a bill to subject land to the payment of a judgment against C., it was alleged that F., the former owner of the land, had conveyed the land to C., but that the deed had been lost. F. was directly interested to show that the land had not been paid for, or that he had not made any deed. The decree made in the case which set up the lost deed and subjected the land as the land of C. would not have been binding upon F. if he had not been a party to the suit, and he was at least a proper party, if not a necessary party, so as to give him an opportunity of defending his title, or if he admitted the conveyance of the title, to preclude him in the future and those claiming under him, from gainsaying C.'s title to the land.
20. EQUITY JURISDICTION—*Complete Remedy.*—Equity has jurisdiction of a bill to enforce a judgment lien under section 3571, Code of 1904, and having acquired jurisdiction for this purpose, it will go on and do complete justice between the parties, even to the extent of enforcing purely legal demands of which it would not otherwise have jurisdiction.
21. LOST INSTRUMENTS—*Jurisdiction of Equity.*—Whether equity has inherent jurisdiction to set up a lost instrument or not, it clearly has jurisdiction to enforce a judgment lien, and having acquired jurisdiction on this ground, it can retain the case so as to do complete justice between the parties, setting up a lost deed if necessary for this purpose; and this, although the suit does not conform to the statutory requirements for setting up lost instruments.
22. EQUITY—*Bill in Equity—Prayer for General Relief.*—A prayer for general relief should never be omitted in any bill in equity, for the reason that if the special relief prayed for cannot be given, the court may under the prayer for general relief grant proper relief consistent with the case made by the bill.
23. EQUITY—*Bill in Equity—Prayer for General Relief.*—This principle is so well known in the profession that it is difficult to believe that a lawyer of any experience would prepare a bill omitting the prayer for general relief, and as it is so universally inserted, it is likely that in taking a memorandum from the bill no particular attention would be paid to its insertion.
24. EQUITY—*Bill in Equity—Prayer for Relief.*—A prayer to subject land to the payment of a judgment carried with it necessarily an implied prayer to do whatever else was necessary and proper for the enforcement of the lien of the judgment

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upon the land. The removal of a cloud occasioned by the loss of the judgment debtor's deed was an essential step in subjecting the land to the payment of the judgment.

25. **JUDICIAL SALES—Removal of Cloud.**—There is no subject about which the courts are more careful than that of judicial sales. It is the effort of the courts at all times to see that the land is brought to the hammer under the most advantageous circumstances so as to realize the best price that can be obtained therefor, and to protect the interests of all parties, and it has been held that before a sale of land is decreed any cloud on the title or any impediment to a fair sale ought to be removed as far as it is practicable to do so.
26. **JUDICIAL SALES—Ascertainment of Liens.**—It is premature and erroneous to order a judicial sale to satisfy encumbrances on land before ascertaining the liens binding the land, their amounts and respective priorities.
27. **LIS PENDENS—Statutes—Code of 1904, Section 3566.**—Code of 1904, section 3566, requiring the docketing of a *lis pendens*, in order to affect a purchaser for value and without actual notice, applies only to a purchaser of real estate in a pending suit, not to a purchaser after the suit has been terminated by a judgment or decree, nor to a purchaser of personal property. Prior to the enactment of this statute, any suit at law or in equity which concerned the title to real estate was notice to all the world of the title of the respective parties to the suit, and whoever bought of either party pending the suit was charged with notice of title set up by the other, and was bound by any judgment or decree affecting that title which was rendered in the suit. The rule is the same now as to personal property, but it has been changed as to real estate so as to require the docketing of a *lis pendens* in order to affect a purchaser for value and without actual notice. The change wrought by the statute applied only to a purchaser of real estate in a pending suit. It was not extended to a purchaser of personal property, nor to the effect of a judgment or decree after the termination of a suit.

Error to a judgment of the Circuit Court of Dickenson county. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

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Irvine & Stuart, for the plaintiff in error.

Fulton & Vicars, Bond & Bruce and Morison, Morison & Robertson and W. H. Rouse, for the defendant in error.

BURKS, J., delivered the opinion of the court.

A. J. Steinman brought an action of ejectment in the District Court of the United States for the Western District of Virginia against the Clinchfield Coal Corporation, to recover all of the bituminous and other coal, iron ore and other minerals underlying a tract of 1,000 acres of land in Dickenson county. The plaintiff offered in evidence the following chain of title: Deed from Philip Fleming to A. J. Steinman and J. D. Price, dated December 18, 1874, recorded December 21, 1874; deed from J. D. Price to A. J. Steinman, dated December 31, 1874, recorded November 4, 1875.

In order to avoid the necessity of tracing his title back to the Commonwealth, the plaintiff relied upon Philip Fleming as the common source of title under which both he and the defendant claimed. The deed under which the defendant claimed title from Fleming was prior in point of date and delivery to the deed under which the plaintiff claimed, but the plaintiff claimed that he was entitled to recover as an innocent purchaser for value and without notice of such prior rights. In order to show that he was such innocent purchaser, he offered the following papers as links in the chain of the defendant's title: Three decrees in the case of Lipps against Collier, Philip Fleming, and others, dated respectively October 23, 1872, May 22, 1873, and April 6, 1874. The second of those decrees, recorded in the deed book of Wise county, in which county the land in controversy was then located, finds that a deed executed by Philip Fleming to James A. Collier, properly ac-

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knowledge, conveying the land in controversy, had been lost, and decrees that Collier shall hold the land free from all claims of Fleming and others; and that this decree shall be recorded and indexed in the deed book of Wise county, which was accordingly done more than a year prior to the conveyance from Fleming to A. J. Steinman and Price.

The plaintiff further offered in evidence sundry deeds to show a chain of title from Collier down to the defendant, which need not be here particularly recited.

The decrees above mentioned were rendered in a suit brought by Lipps against Collier and others, to set aside a deed which Collier had made to a trustee for the benefit of his wife and to subject the land to the payment of a judgment in favor of Lipps against Collier. The plaintiff claims that he had neither notice nor knowledge of the suit, or of the decrees entered therein.

The original papers in this cause have been lost or destroyed, but sufficient appears to show that the plaintiff, Lipps, averred in his bill that Fleming had conveyed the land to Collier, but that the deed had been lost. This averment was apparently necessary in order to show that Collier was the owner of the land, and that it was liable to his judgment, and, in order that a purchaser at the sale might acquire title, Fleming was made a party defendant.

At the conclusion of the evidence, on the motion of the plaintiff, Steinman, the district court directed the jury to return a verdict in favor of the plaintiff for the coal and underlying minerals in a tract of about 395 acres, which is the land in controversy in this suit. The jury returned their verdict accordingly, and the court entered judgment thereon in favor of the plaintiff. To this action of the court the defendant, the Clinchfield Coal Corporation, excepted, and obtained a writ of error from the United States Circuit Court of Appeals, Fourth Circuit. The Circuit Court of Appeals (213 Fed. 557, 130 C. C. A. 137) reversed

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the judgment of the district court, and held that the decree in the Lipps suit was a decree for the recovery of land within the meaning of section 2510 of the Code of Virginia, and that the decree in the Lipps case was properly recorded and indexed, and hence that Steinman was a purchaser with notice.

The case was argued at length in the Circuit Court of Appeals, both on a hearing and a rehearing, but the court on the rehearing adhered to its decision made on the original hearing, and remanded the cause to the district court for a *new trial*. When the case came back to the district court, the plaintiff suffered a non-suit, and brought the present action of ejectment in the Circuit Court of Dickenson county.

On the trial of the case in Dickenson county, the parties waived a jury and submitted all matters of law and fact to the trial court for decision, and by agreement between counsel it was stipulated that the evidence in the case, and the only evidence, should be the same which was introduced by the respective parties in the case recently pending in the District Court of the United States for the Western District of Virginia, at Big Stone Gap, under the title of *A. J. Steinman v. Clinchfield Coal Corporation, et al.*, and that the printed records used on appeal in the last mentioned case in the United States Circuit Court of Appeals, together with a copy of the final opinion of said court in said cause, and of the mandate of said court, and the final order of the district court which dismissed the cause, on motion of the plaintiff, should be placed in the hands of the court and used and considered by it as if the same evidence appearing in said record were re-introduced, and the same objections in all respects made to the said evidence as introduced by the respective parties thereto.

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The Circuit Court of Dickenson county entered judgment for the defendant, the Clinchfield Coal Corporation. To that judgment this writ of error was awarded.

It was contended in the trial court, and is insisted upon with great earnestness in this court, that the judgment of the Circuit Court of Appeals was a final determination of the controversy in favor of the defendant, and that, under the Constitution and laws of the United States, the State courts are bound by the decision of the said federal court and have no jurisdiction to overrule, reverse or in any manner modify the same, and that whether they have such jurisdiction or not, they are bound by the said decision of the United States court as a former adjudication of the question at issue by a court of competent jurisdiction between the same parties, and upon the same issue. It was further insisted that, if this position be not correct, the case on its merits should be decided in favor of the defendant for the same reasons given by the Circuit Court of Appeals.

The defense set up by the Clinchfield Coal Corporation, that the judgment of the United States Circuit Court of Appeals settles the question at issue between the parties and is *res judicata*, cannot be sustained, for the simple reason that the judgment did not *finally* dispose of the issue between the parties, but remanded the case to the district court "for further proceedings in accordance with the views herein expressed." The authorities uniformly agree that in order for a judgment to constitute *res judicata* it must be a final judgment in the case on the merits. Story's Eq. Pl. (4th ed.), sec. 791; *Yates v. Wilson*, 86 Va. 625, 627; 10 S. E. 976; 23 Cyc. 1232; 24 Am. & Eng. Enc. Law (2d ed.) 793. In the instant case there was no final judgment, but a remand of the case for a new trial, on which the evidence may be entirely different from that on the former

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trial. A reversal in a court of last resort *remanding a cause*, cannot be set up as a bar to a subsequent action for the same cause.

"Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action. Consequently, where the action was discontinued, or the plaintiff became non-suit, or where from any other cause, except perhaps in case of a *retraxit*, no judgment or decree was rendered in the case, the proceedings are not conclusive." *Aurora City v. West*, 7 Wall. 82, 93, 19 L. Ed. 42, and cases cited. *Omo hundred v. Omo hundred*, 27 Gratt. (68 Va.) 824; *Chrisman v. Harman*, 29 Gratt. (70 Va.) 494, 26 Am. Rep. 387; *Smith v. Blackwell*, 31 Gratt. (72 Va.) 291.

Closely akin to the doctrine of *res judicata*, however, is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own, though it is at times confused with one or the other of the other two. It is this doctrine of "the law of the case" rather than that of *res judicata* upon which the defendant relies.

The doctrine, briefly stated, is this: Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final. The reason of the rule is twofold. First, after the rehearing period has passed, the appellate court has no power to change its judgment and the mandate for retrial removes the case

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from its jurisdiction. Second, it is necessary to the orderly and efficient administration of justice. It would greatly increase the labor of appellate courts and the costs to litigants if questions once considered and determined could be reopened on any subsequent appeal. The doctrine has been applied in many cases by this court, some of which are here cited. *Howison v. Weeden*, 77 Va. 704; *Stuart v. Preston*, 80 Va. 625; *Carter v. Hough*, 89 Va. 503, 16 S. E. 665; *Lore v. Hash*, 89 Va. 277, 15 S. E. 549; *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Rosenbaum v. Seddon*, 94 Va. 575, 27 S. E. 425, 1 Va. L. Reg. 270 and cases cited; *Norfolk & W. R. Co. v. Duke*, 107 Va. 764, 60 S. E. 96. See also, 26 Am. & Eng. Enc. Law 184 *et seq.*, and cases cited; 3 Words and Phrases (2d ed.) 37. The rule also applies where the question raised on the second appeal was necessarily involved in the first appeal, whether actually adjudicated or not. *Norfolk & W. R. Co. v. Duke*, *supra*, and cases cited. The case last cited well illustrates this feature of the rule. It has been held in (*Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461) that a proceeding by motion for damages would not lie under section 3211 of the Code as it then stood. Nevertheless, the plaintiffs in the case proceeded by motion for damages against the defendant, and there was a judgment for the defendant. On a writ of error awarded the plaintiff the judgment was reversed and the case remanded for a new trial. *Duke v. Norfolk & W. R. Co.*, 106 Va. 152, 55 S. E. 548. No objection to the proceeding by motion had been made by the defendant either in the trial court or in this court, but on the new trial ordered by this court, the objection was made for the first time in the trial court, and it was held too late to raise the question; that the right to proceed in this way was necessarily involved in the first writ of error and hence became

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"the law of the case," and was conclusive on the parties and the courts. *Norfolk & W. Ry. Co. v. Duke*, 107 Va. 764, 60 S. E. 96.

It is not to be supposed, however, that this court could not, in another case, between other parties, adhere to its opinion given in *Wilson v. Dawson*, *supra*, that a motion would not lie for damages. The "law of the case," for the reasons stated, binds the court and the parties in the same litigation, and the final judgment rendered is as much *res judicata* as any other final judgment, but neither the court which rendered the first judgment, nor any other court, is bound to follow it as a precedent in subsequent litigation between other parties. If, in such litigation, it is found to be erroneous, it will not be followed. "The doctrine of the 'law of the case' presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases as a precedent." *Allen v. Bryant*, 155 Cal. 256, 100 Pac. 704; 3 Words and Phrases (2d ed.) 39.

Again, the doctrine of the "law of the case" can only be invoked even between the same parties where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts. 26 Am. & Eng. Enc. Law (2d ed.) 191; *Carper v. Norfolk & W. R. Co.*, 95 Va. 43, 27 S. E. 813.

Sometimes even between the same parties and relating to the construction of the same instrument, the first judgment is neither *res judicata*, nor the "law of the case." It

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must appear not only that the question was the same in both cases, but that the court in the first suit had power and jurisdiction to determine the question. In *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210, it was held that where lands devised are situated in the States of Pennsylvania and Illinois, and the courts of Pennsylvania have construed the will in a suit for partition of the lands in Pennsylvania, the judgment in that suit does not operate as an estoppel in a suit before the Illinois courts for the partition of the Illinois lands, and the Illinois court is not bound by the construction of the will adopted by the courts of Pennsylvania, although the testator was domiciled there. The reason, of course, is that the Pennsylvania court had no power over the Illinois lands. In that case, the Illinois court put a different construction upon the will from that placed upon it by the Pennsylvania court.

It seems hardly necessary to add that, if the parties are different, though the question be the same, the case is controlled by the rule of *stare decisis*, and the doctrine of "the law of the case" has no application.

So, likewise, upon principle and authority, the doctrine of the "law of the case" does not apply to a former decision, in unended litigation, by a court of a foreign jurisdiction. There is no reason why it should. If the litigation in another jurisdiction is not ended, and the opinion or judgment stops short of the dignity of *res judicata*, no reason is perceived why it should be binding on the courts of this Commonwealth. Of course, such opinions and judgments are always entitled to, and will receive, the most careful and respectful consideration, but they are in no sense binding.

In *Hooper v. Atlanta, K. & N. R. Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931, an action to recover damages for a personal injury, brought in the State court, was removed into the United States Circuit Court on the ground

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of diversity of citizenship. There was a verdict and judgment for the plaintiff, which, on a writ of error from the Circuit Court of Appeals was reversed on the ground that the plaintiff's claim was barred by the Tennessee act of limitations, and the cause was remanded to the court "whence it came, with directions to grant a new trial, to sustain the plea of the statute of limitations made to the amended declaration, and to enter judgment for the defendant." On this remand of the case to the lower court, the former judgment was set aside and a new trial granted. At this stage of the case, and before a new trial was had, the plaintiff took a voluntary non-suit and the cause was dismissed. From this judgment of dismissal the defendant company prosecuted a writ of error to the United States Circuit Court of Appeals, insisting that under the former mandate of reversal, the lower court should have entered a final judgment in favor of the defendant company, but the Circuit Court of Appeals sustained the judgment of the lower court in regard to the dismissal. See *Railroad Co. v. Hooper*, 44 C. C. A. 586, 105 Fed. 550. In the meantime, after the voluntary non-suit and dismissal of the case in the United States Circuit Court, the plaintiff brought a new suit for damages in the State Circuit Court of Knox county; the amount sued for in this latter suit not being sufficient to allow defendant to again remove to the federal court. The defendant company demurred on several grounds, and particularly because the removal of the original suit to the federal court had removed not only that suit but the cause of action; that the State court was thereby deprived of all jurisdiction over the subject matter of the suit, and the new suit could not be maintained in the State court. The circuit judge sustained this demurrer on the grounds stated, and dismissed the plaintiff's

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suit. On appeal to the Supreme Court of Tennessee, that judgment was reversed and the cause remanded. The court, amongst other things, held:

"The State court possesses original jurisdiction for all such causes of action. The removal of the case, and its subsequent dismissal untried and undetermined, cannot, under any known rule of law, be held to be a merger of the cause of action, nor can the removal and dismissal of the cause be pleaded in abatement of the new suit brought in the State court. When a cause of action removed into a court of the United States is dismissed therefrom without any trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought."

On the remand of the cause to the Circuit Court of Knox county, such other proceedings were had as that the case again came to the Tennessee Supreme Court on writ of error. *Hooper v. Atlanta R. & N. Co.*, 107 Tenn. 712, 65 S. W. 405. It was then said:

"It is insisted, however, on behalf of the company, that the adjudication of this question by the United States Circuit Court of Appeals, in a suit between the present parties, was final and conclusive. As already stated, the United States Circuit Court of Appeals, in the suit between these parties, held the plea of the statute of limitations good, and remanded the cause, with direction to the lower court to grant a new trial, to sustain the plea of the statute of limitations to the declaration as amended, and to enter judgment for the defendant company. On the remand, and prior to a new trial, plaintiff took a voluntary non-suit. Defendant appealed to the Circuit Court of Appeals, insisting it was entitled to a judgment on its plea of the statute of limitations, and that the court below was in

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error in permitting a non-suit. On this subject that court, interpreting its own judgment, held as follows: "The contention of the plaintiff in error is that the circuit court should have ordered that the defendant's plea of the statute of limitations be sustained, and entered judgment for the defendant in strict conformity with the direction of the mandate. The ground of complaint is that, whereas the judgment directed by the court would have terminated litigation by settling the rights of the parties, the judgment actually entered leaves the plaintiff at liberty to prosecute a new action for the same cause. But we think the course taken by the circuit court was entirely proper. The direction of the mandate, when rightly construed, intended to award the privilege to the plaintiff of having a new trial, if he should desire it, and did not make it compulsory. If the plaintiff should elect to take a new trial, then the further directions of the mandate would govern the court in its further proceedings thereon. Such provisional directions are not unusual in appellate courts, the object being to guide the court below in such further course of procedure. Under the statute of Tennessee (Code 1871, 4246), 'the plaintiff may at any time before the jury retires, take a non-suit or dismiss his action, as to any one or more defendants; but if the defendant has pleaded a set-off or counter-claim, he may elect to proceed on such counter-claim in the capacity of plaintiff.' And at the common law the plaintiff may take a non-suit before the trial begins, and in some jurisdictions at any time before verdict, and the right is the same, whether upon the first trial or upon a new trial, after judgment has been ordered set aside and held for naught, and such new trial ordered. 6 Enc. Pl. & Prac. 836, 838, 839, and cases cited. In the case of *Gardner v. Railroad*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, the plaintiff had brought a suit in the State court for a personal injury, and had recovered a judgment.

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The defendant removed the cause to the supreme court, and that court, upon consideration of the evidence, held that the plaintiff had not made out a cause of action, and for that reason the judgment of the lower court was reversed, and a new trial granted. After the case had been remanded, the court below entered an order setting aside its former judgment and ordering a new trial. Thereupon the plaintiff voluntarily submitted to a non-suit, and judgment was entered accordingly. The plaintiff having commenced a new suit in the federal court, one of the questions was whether he was barred by the determination of the facts and the judgment of the State Supreme Court in the former action. After judgment, the same went to the Supreme Court of the United States, where it was held that by reversal of the judgment of the lower court by the State Supreme Court, the matter was set at large, and that, although the lower court had actually ordered a new trial, as directed by the supreme court, the plaintiff was at liberty to disclaim the right to pursue it, and to become non-suit, and thereupon to commence a new suit in any court having jurisdiction. In the present case, this court did not assume the power of arbitrarily compelling the plaintiff to go to a final determination in the court below. This is the reasonable construction of the mandate. The judgment of the circuit court is affirmed with costs.'

"The judgment of the Circuit Court of Appeals was not a final judgment, and therefore could not support a plea of former adjudication. *Railroad v. Brigman*, 95 Tenn. 624, 32 S. W. 762. But for the error of the circuit court in holding plaintiff's action barred by the statutes of limitations, the judgment is reversed and the cause remanded."

The same question came again before the Supreme Court of Tennessee in *Illinois Cent. R. Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763, upon a similar state of facts, and the court said that counsel had

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at first insisted that the judgment of the Circuit Court of Appeals was *res judicata*, but that they had now somewhat abated their claim, and insisted that the decision was the "law of the case." The court, however, adhered to its former views, and said that the decision of the Circuit Court of Appeals was neither "*res judicata*" nor the "law of the case." A number of decisions of the Supreme Court of the United States are cited, and distinguished from the case under consideration. See also, *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107.

In *Gassman v. Jarvis* (C. C.), 100 Fed. 146, it is held that, when a cause of action removed into a court of the United States is dismissed therefrom, without a trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby; and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought. See also, *Mobile & O. R. Co. v. Healy*, 109 Ill. App. 531; *Macardell v. Olcott*, 62 App. Div. 127, 70 N. Y. Supp. 930.

A number of cases, and also text-writers, have been cited by counsel for the defendant in error in support of the proposition that the judgment of a court of competent jurisdiction is conclusive upon the parties and their privies, in the absence of fraud or collusion, whenever that fact is again in issue between them, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision. This is the familiar doctrine of *res judicata*, and it will be found upon examination that the court or text-writer, in each instance, had reference to either *final* judgments or to *second appeals* of the same case in the same court, and not to judgments remanding causes for *new trial*, as in the instant case. Among the cases and text-writers so referred to, see *Carper v. Norfolk & W. R. Co.*, 95 Va. 43, 27 S. E. 813; *Haffner v. Ches.*

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& O. R. Co., 96 Va. 533, 31 S. E. 899; *Virginian R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570; *Ches. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Forsyth v. City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; *DeChambrun v. Campbell* (C. C.), 54 Fed. 231; *Holmes v. Oregon & C. R. Co.* (C. C.) 9 Fed. 229; 1 Freeman non Judgments (4th ed.), sec. 249.

Upon this branch of the case we are of opinion that the proceedings in the federal courts do not preclude the plaintiff from maintaining the present action. The judgment of the Circuit Court of Appeals, remanding the case for a new trial, is not, as to the present action, either *res judicata* or the "law of the case."

We come then to a consideration of the case upon its merits. The parties claim title from a common source, Philip Fleming. The defendant's title, as traced by the plaintiff, was acquired from Fleming several years before the plaintiff acquired his title, but the plaintiff claims that the deed made by Fleming to James A. Collier, under which the defendant derives title, was lost and never recorded, and that he had no notice, actual or constructive, of that deed, and that, having paid value for the land, he is protected as a subsequent purchaser for value and without notice. Defendant denies that the plaintiff paid value, and asserts that he had notice, both actual and constructive, of defendant's title.

The deed from Fleming to Collier, not having been recorded, was void as to Steinman, provided he was a purchaser for value and without notice. Code, sec. 2465. The defendant attempted to prove that the plaintiff was not a purchaser for value by showing that he paid only \$125 for the coal and minerals underlying a tract of one thousand acres of land, while the land on survey turned out to be over two thousand acres, and that the plaintiff knew that the titles to lands in the county were in a very uncertain

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condition, and hence the low price paid for it. The plaintiff, on the other hand, testified that the price agreed to be paid was \$125 for the coal and underlying mineral in a tract which Fleming had obtained from the Warders. But Fleming had paid only \$125 for the fee in the same boundary of land some fifteen or twenty years prior to that, and now, after a lapse of over forty years, no complaint had ever been made by Fleming that he had not been paid in full, and that the whole price agreed had in fact been paid, and he produced evidence of it. The evidence is clear that Steinman and Price paid the full consideration agreed to be paid for the minerals. Under the law in this State it is not required that the consideration should be either fair or adequate, as is required in some States, but simply that the purchase should be for value; and even where adequate consideration is required it has been held that "no consideration of any value at all, upon which parties capable of contracting with each other, and in the absence of fraud, may agree, can be said, in a legal sense, to be inadequate." *White v. McGannon*, 29 Gratt. (70 Va.) 511; *Hale v. Wilkinson*, 21 Gratt. (62 Va.) 75; *Stearns v. Beckam*, 31 Gratt. (72 Va.) 379. We think that the record clearly shows that the plaintiff was a purchaser for value.

The defendant further attempted to show that even if the plaintiff was a purchaser for value, he was a purchaser with notice of the defendant's title. In order to establish this fact, the defendant attempted to show both actual and constructive notice on the part of the plaintiff. The burden was upon the plaintiff to show that he was a purchaser for value, and that the purchase price had been actually paid before notice of the defendant's title. The burden of showing notice rested upon the defendant. *Lamar v. Hale*, 79 Va. 147. The record fails to disclose actual notice on the part of the plaintiff.

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An attempt was made to show that the title to the property was examined by counsel for the plaintiff, and that he must have discovered record evidence of the defendant's title, and if he did discover it that he communicated it to the plaintiff; but the testimony of the plaintiff's counsel shows that he had no recollection whatever on the subject, and even if notice had been proved as to the plaintiff's counsel, it would have been constructive notice, and not actual notice unless he communicated the information acquired by him to the plaintiff. Notice to the agent of a party is constructive, not actual. *Easley v. Barksdale*, 75 Va. 274, 283. But if he had notice, it is immaterial whether it was actual or constructive.

The chief reliance, however, of the defendant is upon the fact that the plaintiff had notice of the suit of *Lipps v. Collier*, which had been brought in the Circuit Court of Wise county, affecting the tract of 395 acres of land, which is the land in controversy in this suit. This was a suit by Lipps, a judgment creditor, against James A. Collier, Philip Fleming, Casander Boatwright (formerly Collier) and John Riner, as trustee. The object of the suit was to enforce against the 395-acre tract of land a judgment for money which Lipps had obtained against Collier. The bill set out the judgment; that Fleming had some time previously conveyed the land to Collier by a deed which had been lost; and that Collier had subsequently conveyed the land to Riner, as trustee, for the benefit of his (Collier's) wife. The bill prayed for an enforcement of the judgment against the land. To do this it was necessary to set aside, for the purpose of the judgment, the deed from Collier to Riner, trustee. The original papers in this suit have been lost, and a statement of the contents of the bill has been supplied by the deposition of the counsel for the plaintiff, who states that he carefully examined it and the other papers in the case, and made a very full memorandum there-

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from. He states that the bill contained no prayer for general relief, nor to set up the lost deed. He seems to be positive of these facts, though he testified in part from memory and in part from a memorandum made some five or six years prior to his testimony. During the pendency of that suit the case was referred to a special commissioner to ascertain the true and correct boundary of the land sold by Fleming to Collier. This the commissioner ascertained from the deposition of Fleming, and reported fully on it. On May 22, 1873, a decree was entered which contained, amongst other things, the following adjudication:

"Wherefore on consideration it is adjudged, ordered and decreed that the said James A. Collier or those who claim through him hold the said land in fee by title firm, stable, free from all claims of the said Philip Fleming or his wife, Minerva, in as full and ample a manner as if the lost deed were on record, and it is also ordered that a copy of this decree be recorded in the clerk's office of the county court of this county in the book wherein deeds are recorded, and the same shall be indexed in the name of grantor and grantee."

This decree was duly recorded in the Circuit Court of Wise county, in which the land then lay, June 5, 1873. Whether or not it was properly indexed is a subject of controversy. Subsequently, the plaintiff's judgment was paid off, and the suit was dismissed from the docket.

The Circuit Court of Appeals held that the suit of *Lipps v. Collier* was a suit for the recovery of land, and that the decree of May 22, 1873, was properly recordable under section 2510 of the Code; that it was duly indexed; and that consequently it gave the plaintiff constructive notice thereof. With great respect for the Circuit Court of Appeals, we feel compelled to dissent from its conclusion. Section 3454 of the Code, amongst other things, gives to any person who thinks himself aggrieved by any judgment,

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decree, or order "in a controversy concerning the title to or boundaries of land" the right to appeal regardless of the amount in controversy. Section 3455 denies the right of appeal, in matters merely pecuniary, from a judgment, decree or order in a controversy in a matter less in value or amount than \$300, exclusive of costs. In considering these sections this court has had occasion, in a number of cases, to determine when "a controversy concerns the title to or boundaries of land," and has held that a decree for sale of land in a partition suit, or for the appointment of a receiver, whereby change was made in possession or control of property, judgments in actions of unlawful entry and detainer, and decrees in suits relating to trust deeds upon real estate securing less than the minimum pecuniary jurisdiction of the court, all concern the title of land. *Stevens v. McCormick*, 90 Va. 736, 19 S. E. 742; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437; *Deckert v. Chesapeake Western Co.*, 101 Va. 804, 45 S. E. 799; *Pannill v. Coles*, 81 Va. 380; *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754. While, on the other hand, it has been held time and again that, in a suit to subject land to the payment of a judgment, the amount in controversy is to be determined by the amount of the judgment, and the title or boundary of land is not involved. The jurisdiction of the court on an appeal by the defendant is regulated by the amount decreed against him, or declared to be a lien on the land. *Fink v. Denny*, 75 Va. 663; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. 472; *Cook v. Bondurant*, 85 Va. 47, 6 S. E. 618; *Smith and wife v. Rosenheim*, 79 Va. 540; *Patteson v. McKinney*, 88 Va. 748, 14 S. E. 379; *Cash v. Humphreys*, 98 Va. 477, 36 S. E. 517; *Cook v. Daugherty*, 99 Va. 590, 39 S. E. 223. It has also been expressly held that a suit to subject land to the lien of a judgment is not a suit for the recovery of land. *Flanary v. Kane*, 102 Va. 547, 557, 46 S. E. 312, 681.

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As the case of *Lipps v. Collier* was not a suit for the recovery of land, the court is of the opinion that section 2510 of the Code has no application to the decree rendered therein May 22, 1873. Nor do we think that any other section of the Code applies to said decree, and the recordation, therefore, of the decree, whether properly indexed or not, was not constructive notice to the plaintiff.

The court is of the opinion, however, that parties to judgments and decrees, and their privies, are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself. We need not stop to consider the different classes of privies. One who has succeeded to the right, title or interest of another in real estate is a privy in estate, and is bound by judgments and decrees against his grantor. In *Eakin v. McCraith*, 2 Wash. T. 112, 3 Pac. 838, it was held that a judgment in a former action between the defendant and plaintiff's grantor, in which the title to the land in controversy was in issue, will bind the plaintiff in a subsequent action of ejectment. In *Central National Bank v. Hazard* (C. C. N. D. New York), 30 Fed. 484, 486, it was held that every person is privy to a judgment whose succession to the rights of property thereby affected occurred subsequently to the commencement of the suit. Every grantee is estopped by the judgment against his grantor because he holds by a derivative title from such grantor. Freem. Judgm., sec. 162; *Adams v. Barnes*, 17 Mass. 367; *Campbell v. Hall*, 16 N. Y. 575.

In *Cushing v. Edwards*, 68 Iowa 145, 25 N. W. 940, it was held that a party who has constructive notice of the sheriff's deed of property which was afterwards conveyed to him, cannot defeat the title of the party under the sheriff's deed on the ground that he has no notice of the judgment on which the property was sold.

In *Whitford v. Crooks*, 54 Mich. 261, 20 N. W. 45, the opinion was delivered by Cooley, Chief Justice. In that case one Kean brought an action of ejectment in 1869 against the executors of a decedent to recover a section of real estate. The action involved the fee of the land. Kean recovered a judgment for the north half of the section, and the defendants for the south half. Kean, after his ejectment suit was determined, gave a deed to the part which he had failed to recover, that is, the south half, to one Benedict, and Benedict conveyed to Crooks. Crooks entered into possession of the land and an action of ejectment was brought against him by the alienee of the executor and heirs. The alienee claimed the right to recover on the ground that the deed from Kean to Benedict, and from Benedict to Crooks put Crooks in no better position than Kean himself stood, and that the recovery against Kean estopped not only him but also Crooks from recovering the land, and the court so held. The judgment was given for the plaintiff on the ground that the prior judgment bound not only Kean, but Crooks as alienee.

New York had a statute very similar to ours requiring judgments for money to be docketed. The question there arose as to whether or not a judgment in ejectment which was not docketed was binding on a subsequent alienee of one of the parties. In *Sheridan v. Andrews*, 49 N. Y. 478, 481, Rapallo, Judge, said: "The docketing under the act of 1840 in the county clerk's office was not essential to the conclusiveness of the judgment. Such docketing is only required for the purpose of making a money judgment a lien on the real estate of the debtor, and as a preliminary to the issuing of an execution. This judgment is not sought to be enforced as a lien, but is set up as an estoppel.

"The material point of inquiry is whether the defendants are persons claiming from or through Jackson, by title ac-

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cruing after the commencement of the action against him. If they are, the judgment is conclusive upon them as to the plaintiff's title.

"The point, that the absence of a notice of *lis pendens* deprives the judgment of its effect as against persons claiming from or through the defendants, cannot be sustained. The only office of a notice of *lis pendens* is to give notice of the pendency of the action so as to affect persons who may deal with the defendants in respect to the property involved, before final judgment, and thus bind them by the judgment in the same manner as if they had been made parties to the action. Formerly the commencement of a suit in equity was of itself constructive notice to subsequent purchasers, and they were bound by the decree. This rule was adopted in analogy to the rule in real actions at common law, that if the defendant aliened, pending the writ, the judgment would overreach such alienation (*Murray v. Ballou*, 1 Johns. Ch. 577)."

Speaking further of the statute for docketing *lis pendens*, he said: "This section does not, nor do any of the previous statutes, relate to the effect of a judgment or to the rights of parties claiming under a title acquired after judgment, but only to those who take during the pendency of the action.

"Section 132 of the Code provides that *the pendency of the action* shall be constructive notice to purchasers from the time of the filing of the notice only, and that such purchasers shall be bound by all proceedings taken after the filing of such notice to the same extent as if they were made parties to the action. This is the whole scope and object of the notice. It has no relation to titles acquired after judgment. It never was pretended that any notice was necessary to render the judgment effectual as against parties claiming under the defendant by transfer subsequent to the judgment. (*Campbell v. Hall*, 16 N. Y. 579,

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580). The judgment disposes of the rights of the parties and is a matter of public record. Its effect cannot be impaired by any subsequent transfer by the defendant. He is concluded by it, and his grantee cannot be in any better situation than the party from whom he obtained his right. (Bacon's Ab., Evidence, f.) The recording acts have no relation to the subject."

This must of necessity be true. There would be no end of litigation if the effect of a judgment or decree could be avoided by a simple transfer of the property by the unsuccessful litigant as soon as an adverse judgment or decree was rendered. Decrees are rendered every day construing contracts, deeds, wills and other documents, and such decrees bind not only the parties to the litigation, but all persons claiming under them, with or without notice of the decree. The privies can stand on no higher footing than their principals. The legislature, of course, might change this, if it deemed it wise and practicable to do so, but it has not done so.

It would seem, therefore, that the plaintiff was bound by the proceedings in the case of *Lipps v. Collier*, in consequence of the fact that he took his deed from Fleming after the termination of that suit, and that the recording acts do not affect the question, unless the plaintiff can bring himself within some exception to the rule on that subject.

The plaintiff seeks to avoid the consequence of this rule by alleging that "it can only be the necessary parties and their privies who are bound, and then only upon proper pleadings." We cannot give our assent to this proposition. No authority is cited for it, nor should we be inclined to follow it, if it had been cited. Judgments bind the actual parties to the suit, whether they were necessary parties or simply proper parties. It is said that those are held to be parties who have a right to control the proceedings, to make defense, to produce and cross-examine witnesses, and

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to appeal from the decision if any appeal lies. It is further said that these also may be termed parties "for or against whom the record of the former proceedings might be adduced in another trial." 2 Black on Judgments, sec. 534, and the cases cited.

Fleming was the former owner of the land, and it was alleged in the bill that he had conveyed the land to Collier, but that the deed had been lost or mislaid. Fleming was directly interested to show that the land had not been paid for, or that he had not made any deed. The decree made in the case which set up the lost deed and subjected the land as the land of Collier would not have been binding upon Fleming if he had not been a party to the suit, and in our judgment he was at least a proper party, if not a necessary party, so as to give him an opportunity of defending his title, or if he admitted the conveyance of the title, to preclude him in the future and those claiming under him, from gainsaying the plaintiff's title to the land. In the case of *Findlay v. Hinde*, 1 Pet. 242, 7 L. Ed. 128, the court said, it appears from the answers and title deeds filed in the cause that all the defendants are interested in defending the title as they stand in the relation to each other as vendors, grantees, and vendees. In the course of the opinion, referring to a grantor somewhat similarly situated, the court said, "he might insist that the purchase money had not been paid or make various other defenses." It is not true that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him the validity of his obligation to convey and to overrule such defense as he might make."

As to the propriety of the pleadings in the case, it is clear that equity had jurisdiction of the bill to enforce the judgment lien under section 3571 of the Code, and having acquired jurisdiction for this purpose, it will go on and do

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complete justice between the parties, even to the extent of enforcing purely legal demands of which it would not otherwise have jurisdiction. *Anderson v. Harvey*, 10 Gratt. (51 Va.) 386; *McArthur v. Chase*, 13 Gratt. (54 Va.) 683; *Walters v. Farmers' Bank*, 76 Va. 12; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Miller v. L. & N. R. Co.*, 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; *Deveney v. Gallagher*, 20 N. J. Eq. 33; 1 Pom. Eq., sec. 181; *Moorman v. Board of Sup. Campbell Co.*, 121 Va. 112, 92 S. E. 833.

It was insisted, however (1) that equity has no inherent jurisdiction to set up lost documents; (2) that the suit of *Lipps v. Collier* did not conform to the statutory requirements of sections 2361-2-3-4; and (3) that there was no prayer for general relief. It was conceded that the suit of *Lipps v. Collier* did not conform to the statutes for setting up lost instruments, but that is deemed unnecessary. Without conceding the correctness of the first proposition (see *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532, and cases cited; 13 Ency. Pl. & Pr., 351ff; 25 Cyc. 1609ff) it is immaterial whether equity had inherent jurisdiction to set up a lost instrument or not. It clearly had jurisdiction to enforce the judgment lien, and having acquired jurisdiction on this ground, upon well settled principles, it could retain the case so as to do complete justice between the parties. See cases hereinbefore cited.

As to the absence of a prayer for general relief, it is said that this is a prayer that should never be omitted in any bill in equity, for the reason that if the special relief prayed for cannot be given, the court may under the prayer for general relief grant proper relief consistent with the case made by the bill. *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721. This principle is so well known in the profession that it is difficult to believe that a lawyer

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of any experience would prepare a bill omitting the prayer for general relief, and as it is so universally inserted, it is likely that in taking a memorandum from the bill no particular attention would be paid to its insertion. Conceding, however, that the bill contained no prayer for general relief, still the prayer to subject the land to the payment of the judgment carried with it necessarily an implied prayer to do whatever else was necessary and proper for the enforcement of the lien of the judgment upon the land. The removal of the cloud occasioned by the loss of the judgment debtor's deed was an essential step in subjecting the land to the payment of the judgment.

There is no subject about which the courts are more careful than that of judicial sales. It is the effort of the courts at all times to see that the land is brought to the hammer under the most advantageous circumstances so as to realize the best price that can be obtained therefor, and to protect the interests of all parties, and it has been held that before a sale of land is decreed any cloud on the title or any impediment to a fair sale ought to be removed as far as it is practicable to do so. *Thomas v. Farmers' Nat. Bank*, 86 Va. 291, 9 S. E. 1122. In a great number of cases it has been held premature and erroneous to order a judicial sale to satisfy encumbrances on land before ascertaining the liens binding the land, their amounts and respective priorities; the reason assigned being because otherwise there would be a tendency to sacrifice the property sold by discouraging creditors from bidding as they probably would if their right to satisfaction of their debts had been previously ascertained. *Coles v. McRae*, 6 Rand. (27 Va.) 644; *Horton v. Bond*, 28 Gratt. (69 Va.) 815; *Shultz v. Hansbrough*, 33 Gratt. (74 Va.) 567; *Fidelity Loan Co. v. Dennis*, 93 Va. 504, 25 S. E. 546; *Bristol Iron & Steel Co. v. Caldwell*, 95 Va. 47, 27 S. E. 838; *Sims v. Tyrer*, 96 Va. 14, 30 S. E. 443. It was the duty of the court, as far as

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possible, to remove all impediments to a fair sale and one to the best advantage. We think that the relief might properly have been granted by the court under this special prayer.

The only remaining ground assigned by the plaintiff to show that he was not bound by the decree in the case of *Lipps v. Collier* is the policy of the law of this State as manifested by section 3566 of the Code requiring the docketing of *lis pendens*, thereby indicating that the record of the suit is not notice to the world. Prior to the enactment of this statute, any suit at law or in equity which concerned the title to real estate was notice to all the world of the title of the respective parties to the suit, and whoever bought of either party pending the suit was charged with notice of title set up by the other, and was bound by any judgment or decree affecting that title which was rendered in the suit. Merwin on Equity, sec. 769; *Union Trust Company v. Southern Navigation Company*, 130 U. S. 565, 9 Sup. Ct. 606, 32 L. Ed. 1043; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566.

Of course, if the mere pendency of a suit bound the parties, the final judgment entered in the case necessarily bound them. The rule is the same now as to personal property (*Osborn v. Glascock*, 39 W. Va. 749, 20 S. E. 702), but it has been changed as to real estate so as to require the docketing of a *lis pendens* in order to affect a purchaser for value and without actual notice. The change wrought by the statute applied only to a purchaser of real estate in a pending suit. It was not extended to a purchaser of personal property, nor to the effect of a judgment or decree after the termination of a suit. As to purchasers of personal property after termination of the suit, the common law still prevails. *Sheridan v. Andrews*, 49 N. Y. 478.

The plaintiff is bound by the proceedings in the suit of *Lipps v. Collier*, and took his deed in subordination to the

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rights of the defendant. Holding under Fleming, he is estopped by the decrees in *Lipps v. Collier* from asserting a title against the defendant which had been adjudged against his grantor and in favor of defendant's remote grantor. For these reasons, the judgment of the circuit court must be affirmed.

Affirmed.

Staunton.

SUTHERLAND AND OTHERS V. GENT.

September 20, 1917.

1. PUBLIC LANDS — *Interlocks — Adverse Possession.*—Where one grant conflicts in part with another, occasioning an interlock, the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee, under his grant, acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which has already vested in the senior grantee. Where, in the case of conflicting grants, the junior patentee settles upon that portion of the land within the interlock, claiming the whole within his boundary, he thereby ousts the senior patentee of his constructive seisin and becomes actually possessed to the extent of his grant. Here possession of part is possession of the whole. But if his settlement is outside of the interlock, the possession of part is to be construed in reference to the conflict of boundaries, and, with whatever claim it be taken, it gives him possession of that part of the land only lying without the interlock. To overcome the constructive seisin in deed of the senior patentee and work an ouster, there must be an actual invasion of his boundary by some act or acts palpable to the senses and which would serve to admonish him that his seisin is molested.
2. APPEAL AND ERROR—*Conflict of Evidence—Review by Appellate Court.*—In an action of ejectment, the questions at issue were whether the plaintiff had shown the location of the land in question in a certain block of a survey, and whether defendants had shown adverse possession under color of title of the land claimed by them, or any part thereof, within an interlock, for ten years since the senior title of plaintiff accrued. As both these propositions involved jury questions, and both, upon highly conflicting evidence, were fairly submitted to and passed upon by the jury in favor of the plaintiff, their findings upon the facts, approved by the trial court, were beyond the cognizance of the Supreme Court of Appeals.

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3. INSTRUCTIONS—*Sufficiency*.—Where the instructions, as a whole, fully and correctly propounded the law upon every material question in the case, more cannot be required of the trial court.

Error to a judgment of the Circuit Court of Russell county in an action of ejectment. Judgment for plaintiff. Defendants assign error.

Affirmed.

PLAINTIFF'S INSTRUCTIONS.

No. 1.

The court instructs the jury that if they believe from a preponderance of the evidence in the case that the plaintiff has shown legal title in himself to the land in controversy and the present right of possession at the time of the institution of this suit, then they must find for the plaintiff.

No. 2.

The court instructs the jury that if they believe from a preponderance of the evidence in this case, that the land in controversy is in what is known as Block No. 27 of the Richard Smith patent and surveys, and that plaintiff has connected himself therewith under his title papers introduced in evidence, that they cover said land and plaintiff had the right of possession at the time of the institution of this suit, then you will find for the plaintiff.

No. 3.

The court instructs the jury that while lands remain un-cleared or in a state of nature, they are not susceptible of adverse possession against an older patentee, or one holding under such older patentee, except by acts of ownership effecting a change in their condition, which, from their nature, indicate a notorious claim of title, and to constitute

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such adverse possession there must be occupancy, cultivation, improvement, or other open, notorious and habitual acts of ownership.

No. 4.

The court instructs the jury that the defendants to sustain their defense of continued adversary possession must show that such possession was continuous for a period of ten years prior to the institution of this suit, and the court tells the jury that abandonment of possession, if the jury should believe by a preponderance of the evidence there was an abandonment, would break the continuity, unless the abandonment was after the end of the continuous ten year period.

No. 5.

The court instructs the jury that if they believe from a preponderance of the evidence that the plaintiff has legal title to the land in controversy under his title papers in the manner set out in plaintiff's instruction No. 2 and that the 207-acre tract or any part of the land claimed by defendants laps on plaintiff's land then defendants must prove actual open, notorious, exclusive, and continuous possession of some part of the land described in plaintiff's declaration for a period of ten years, or possession of some part of the 207-acre tract, claiming the whole, for ten years continuously, prior to the institution of this suit before such adverse possession can avail defendants in this case and defeat plaintiff's right to recover.

No. 6.

The court instructs the jury that if they believe from a preponderance of the evidence in this case that plaintiff has legal title to the land in controversy, under title papers introduced in evidence, as stated in plaintiff's instruction No. 2, and that the deed introduced in evidence by defendant from Alexander Sutherland to them, dated on the 27th day

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of August, 1888, for 207 acres covers any part of the land described in plaintiff's declaration for said 207 acres of land, that then before possession of defendants of said land can ripen into good title by adverse possession the defendants must have actual, open, notorious, exclusive, and continuous possession of some part of the land described in plaintiff's declaration for a period of ten years, or possession of some parts of the 207-acre tract claiming the whole, prior to the institution of this suit.

No. 7.

The court instructs the jury that there are five characteristics of adverse possession of land, which must exist, before title to land is acquired by such adverse possession, as follows:

First: It must be hostile to, or adverse to the true title holder.

Second: It must be an actual possession.

Third: It must be a visible, notorious and exclusive possession.

Fourth: It must be a continuous possession.

Fifth: It must be a possession under color of title.

No. 8.

The court instructs the jury that occasional acts of trespass on forest land uninclosed, annually entering on said land to range cattle in the woods, or salt cattle or ranging sheep or hogs, and other like acts, amounting to mere trespasses, are not sufficient to establish actual possession.

No. 9.

The court instructs the jury that the defense of adverse possession in this case is an affirmative defense and that the burden of proof is on the defendants to establish such adverse possession by a preponderance of the evidence in the case.

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To the giving of all or any of which said instructions, the defendants objected, but the court overruled the defendants' objections and gave to the jury all of the said nine instructions offered by the plaintiff as above set forth, to which ruling and action of the court in overruling defendants' objection to the said instructions the defendants then and there excepted. And thereupon the defendants on their part offered twenty-five instructions numbered from one to twenty-four inclusive, one being numbered three and one-half, and asked the court to give the same to the jury, which said instructions are in the words and figures following:

DEFENDANTS' INSTRUCTIONS.

No. 1.

The court instructs the jury that the possession by the defendants of the land in controversy is *prima facie* evidence that they have title thereto. And in order to entitle the plaintiff to recover in this action he must show he has complete legal title to the land, and without such proof the jury must find for the defendants, whether the defendants have any title or not.

No. 2.

The court instructs the jury that the plaintiff can recover in this action only on the strength of his own title; that it does not matter whether the title of the defendants is defective or not, the question is not whether the defendants have title to the land in this suit mentioned, but whether the plaintiff has title thereto.

No. 3.

The court instructs the jury that the plaintiff must show the legal title in himself and a present right of possession at the time of the commencement of this action, before the

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defendants are called upon to show anything, and **the party in possession is presumed to be the owner until the contrary is proved.**

No. 3½.

The court instructs the jury that the plaintiff **cannot recover in this case unless the land in controversy is in Richard Smith grant No. 27; and the burden is upon the plaintiff to establish this by a preponderance of the evidence.**

No. 4.

The court instructs the jury that the burden is **upon the plaintiff to prove by a preponderance of the evidence in this case that the land in controversy actually lies within grant No. 27 of 5,000 acres from the Commonwealth to Richard Smith; and unless you believe that the plaintiff has so proven this as a fact, then you must find for the defendants in this case, whether the defendants have any title thereto or not.**

No. 5.

The court instructs the jury that if they believe from all the evidence that the boundaries of grant No. 27 of 5,000 acres from the Commonwealth to Richard Smith are in such doubt and uncertainty that they cannot say whether or *not* they embrace the land in controversy, then they must find for the defendants.

No. 6.

The court instructs the jury that even should they believe by a preponderance of the evidence that the land in controversy lies within the Richard Smith patent No. 27 of 5,000, yet if you believe that the same had been conveyed by Warders prior to June 23, 1888, to Dale Carter, or that the defendants have held the same or any part thereof in adverse possession for a period of ten years prior to the time plaintiff, Gent, moved his sawmill thereon, under color of title, then you must find for the defendants.

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And in this connection the court tells the jury that the deed of August 27, 1888, or by writing purporting to convey land constitutes color of title, and it makes no difference whether the color of title is good or bad title or whether the same has been lost or seen by anybody but the parties thereto, so it sufficiently describes the land.

No. 7.

The court further tells the jury that unless it has been satisfactorily shown by a preponderance of the evidence that the deeds of May 12, 1908, and May 15, 1908, from Thompson and Jamison respectively to the plaintiff, Gent, covers the land in controversy then they cannot find for the plaintiff more than a one-sixth interest in the land in controversy.

And the court further tells the jury that if they believe from all the evidence that the boundaries of the said deeds are in such doubt and uncertainty that they cannot say they embrace the land in controversy then they cannot find for the plaintiff more than one-sixth undivided interest in the land in controversy.

No. 8.

The court instructs the jury that in an action of ejectment a defendant who is in peaceful possession of land sought to be recovered is entitled to hold the same against all the world except the true owner thereof.

No. 9.

The court instructs the jury that if they believe from the evidence in this case, that Alexander Sutherland and the defendants to whom he conveyed same were at any time living upon, occupying and in actual possession of the land in controversy, then such possession during its continuance was notice to all persons whomsoever of whatever claim said Alexander Sutherland and said defendants had to said land in question.

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No. 10.

The court further instructs the jury that if they believe that the defendants have had adverse possession of the land in dispute for the period of ten years prior to the institution of this suit that this gives the defendants the right to recover even against the strongest proof of title, which, independent of such adversary possession, would be better title, and the jury should find for the defendants.

No. 11.

The court instructs the jury that the exercise by the defendants, or their father under whom they claim, of visible, open, notorious and habitual acts of ownership, over the land in controversy is sufficient evidence of possession, and it is not necessary to such possession that the land should be enclosed, or built upon, or actually cultivated or cleared.

No. 12.

The court instructs the jury that color of title is a writing purporting to convey land and if they believe from the evidence in this case that the defendants or their father under whom they claim, entered upon any part of the land described in the deeds June 23, 1888, and August 13, 1888, from Warders to Musick, and held the same adversely for a period of ten years prior to the institution of this action claiming the same, under said color of title, then you must find for the defendants, it matters not what grant you believe it lies in.

No. 13.

The court instructs the jury that in order to constitute adverse possession, it is not necessary that the land should be enclosed or built upon, but the entry by the defendants and those under whom they claim must have been made under a claim of title, with the intention of taking possession, and be accompanied with such visible, actual, adverse,

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continuous and exclusive acts of ownership, as from their nature indicate a notorious claim to, and possession of the property, and if they believe from the evidence that the defendants and their father through whom they claim took possession under such a claim of title of the land in controversy, and have continuously, for the period of ten years prior to the institution of this action, exercised such actual, hostile, visible and exclusive acts of ownership over the land, as, from their nature, indicated a notorious claim to, and possession of, the property they must find for the defendants.

No. 14.

The court instructs the jury that, one in *bona fide* possession of land, is presumed to have a legal title until the contrary is shown, and, therefore, if they believe from the evidence that the defendants, W. H. Sutherland and others, were at the institution of this suit in *bona fide* possession of the 207-acre tract of land claimed by them, which includes the land in dispute, having cleared, cultivated and built upon portions of said tract, claiming under a deed for the same, then they are presumed to have the legal title to the said 207-acre tract, including the land in dispute, until the contrary is shown.

No. 15.

The court instructs the jury that the plaintiff, J. W. Gent, must show a legal title in himself, and a present right of possession at the time of the commencement of this action, before the defendants, W. H. Sutherland and others, are called upon to show anything; and the party in possession is presumed to be the owner until the contrary is shown, and if they believe the defendants, W. H. Sutherland and others, were at the time of the institution of this suit, in possession of any part of the 207-acre tract, claimed by them, including the land in controversy, under a deed de-

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scribing the boundaries of same, and claiming all the land within such boundaries, they are presumed to be the owners of the land in controversy until the contrary is proved.

No. 16.

The court instructs the jury, that even should they find that the land in controversy is in Richard Smith grant No. 27 of 5,000 acres, still if they believe from the evidence, that a deed was made by Jesse Wampler prior to August 27, 1888, about the year 1885 or 1886, or thereabouts, to Alexander Sutherland, for the tract of 207 acres, which was also within the said grant No. 27, and including the disputed land, giving the courses and distances; that the defendants, W. H. Sutherland and others, connect themselves with this Wampler title by a regular chain of conveyances (from Jesse Wampler to Alexander Sutherland and from Alexander Sutherland to themselves); that Alexander Sutherland took possession of the land, and held and claimed same under the deed made by Jesse Wampler to him, the said Alexander Sutherland, cleared, fenced and erected buildings upon and cultivated portions of the land, claiming title to the whole boundary embraced by his deed, from Jesse Wampler; that the defendants, W. H. Sutherland and others, and their father, Alexander Sutherland, under whom they claim, having continuously held and cultivated the cleared land from the time Alexander Sutherland took possession for more than ten years prior to July 3, 1906, claiming title to the whole boundary embraced by the deed from Jesse Wampler to Alexander Sutherland that they cut timber for rails to build and repair fences on the land, and for sawing into lumber and deadened timber on the wooded portions of this land; and that at the time Alexander Sutherland took possession of the said 207-acre tract, which includes the land in controversy under the deed made to him by Jesse Wampler, the Warders were not in possession.

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either in person or by tenant, of any part of the larger tract of land claimed by them, which includes said 207-acre tract, they should find for the defendants, W. H. Sutherland and others, in this action, even though they should further believe that Jesse Wampler did not have any title to the said 207-acre tract deeded by him to Alexander Sutherland, and that the greater part of the said 207-acre tract may have remained in the woods and in a state of nature.

No. 17.

The court instructs the jury if they believe from the evidence in this case that Alexander Sutherland was in adverse possession of any part of the 207-acre tract of land under color of title, claiming to the extent of his boundaries, prior to June, 1888, and that the 207-acre tract of land lies wholly within the Richard Smith patent No. 27, that on the 27th of August, 1888, Alexander Sutherland delivered a deed to, and possession of said tract of land of 207 acres, which included the land in controversy, to the defendants in this case, who thereupon entered upon the same or any part thereof and cleared, cultivated, cut timber, paid taxes, improved, and used the same for farming purposes, and held possession thereof, openly, notoriously, exclusively, and continuously for a period of ten years thereafter, claiming the same under said deed, then good and perfect legal title to the said land so described in said deed and each and every part and parcel thereof was thereby invested in the defendants, and they must find for them in this case. And the court further says if the defendants so entered upon any part of the land described in the deed by their father, Alexander Sutherland, and so held possession of the same, or any part thereof, for the said period of ten years the possession of the same or any part thereof was possession of each and every part described in said deed, and it makes no difference whether such possession was above or below

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the Josh Elliott house, so that it was in boundaries of the 207-acre tract, described in the said deed to them by their father or whether the same lies in grant No. 26 or 27 to Richard Smith; and if the jury so believes they must find for the defendants. And the court further tells the jury that if they believe Joe Skeen or Josh Elliott, or both of them, lived upon said land, as tenants of the defendants, then their possession must be counted for the defendants.

No. 18.

The court instructs the jury that if they believe from the evidence that in the year 1885 or 1886, Jesse Wampler executed a deed describing the land in controversy, and delivered the same to Alexander Sutherland, who was clearing or had cleared a portion thereof and that Alexander Sutherland continued to clear, occupy and hold the lands described in the said deed, from Jesse Wampler, or then entered thereon, or any part thereof, and continued to hold the same in actual, continuous and exclusive possession, until the 27th of August, 1888, and on that date or afterwards sold and conveyed the same to his sons and daughters, the defendants in this case, by a writing describing the lands in controversy, and delivered to them the possession, and that they, the defendants in this case, continued to hold the land, occupy, or possess the same in the continuous and exclusive possession, claiming the same as their own under said deed or deeds, for a period of ten years from the time that Wampler delivered the deed to the said Alexander Sutherland, at the end of said period of ten years, a perfect legal title to said land and each and every part thereof was thereby vested in the defendants, and after the end of the said ten years no statement of any of them could affect, divest or convey the same or any part thereof, but they could only convey the same by deed, and if the jury so believe they shall find for the defendants.

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No. 19.

The court further tells the jury that after a person had been in adverse possession of a tract of land under color of title for ten years he has a perfect legal title thereto, and no statement afterwards can in anywise affect the title thus acquired, and no one can recover in ejectment from a person having such a legal title.

No. 20.

The court further tells the jury that the ejectment suit of Beam against Dock Sutherland cannot in any event affect the rights or interest of any of the other defendants than Dock Sutherland in this case, in any manner or on any account, or affect their possession to the lands in the 207-acre tract.

No. 21.

The court further tells the jury that unless they believe that the judgment for the 196 acres of land recovered in the ejectment suit of Beam against Dock Sutherland covers the land in controversy, and the burden is upon the plaintiff to prove this and the location and the extent thereof, by a preponderance of the evidence, then it cannot affect the possession of the defendant, Dock Sutherland. And it cannot affect his possession any farther than the plaintiff has shown it covers the land in controversy.

No. 22.

The court instructs the jury that a recovery in ejectment of land in the actual possession of another does not affect his possession or stop, prevent, or suspend, the running of the statute of limitations, in his favor, unless a writ of possession issued on such judgment of recovery, or the party recovering afterwards entered into possession in such a manner that if he had no title it would be sufficient possession to be adversary possession against the true owner, and

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merely walking over or surveying, or occasionally cutting timber without such possession is not sufficient. Neither is an agreement that a person recovering in ejectment may enter thereunder sufficient to suspend the running of the statute, unless there is an actual entry of like character.

No. 23.

The court instructs the jury that the ejectment suit of Beam against Dock Sutherland cannot be considered by you in locating the land in any particular grant, or whether the plaintiff has title to any part of the land in controversy, but can only be considered by you in determining the character of Dock Sutherland's possession to the 207-acre tract, as to whether it was adverse or not, in so far as the 207-acre tract was covered by the 196-acre tract embraced in said suit.

No. 24.

The court instructs the jury that if they believe from the evidence in this case that the defendants held adverse possession, prior to the institution of this action, of any part of the lands in controversy for a period of ten years after the recovery in ejectment by Beam against Dock Sutherland in 1891, claiming under the deed of their father to them of August 27, 1888, and, to the extent of said deed, then they must find for the defendants, even though Beam dispossessed them or re-entered on said lands after said suit.

To the giving of said instructions as offered by the defendants the plaintiff objected, and thereupon the court refused to give said instructions offered by the defendants, as above set out, numbered 1, 2, 3½, 15 and 16, and modified and gave only as modified said instructions offered by defendants as above set forth, numbered 6, 7, 8, 17, 18, 19,

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20, 21, 22, 23 and 24, which last named instructions, as modified by the court and only given as so modified, are as follows:

No. 6—As Modified.

The court instructs the jury that even should they believe by a preponderance of the evidence that the land in controversy lies within Richard Smith patent No. 27 or 5,000 acres, yet if you believe that the plaintiff has not proven the same had been conveyed by Warders prior to June, 1888, to Dale Carter, or that the defendants have held the same or any part thereof, in adverse possession, as defined in the instructions given in this case on adverse possession, for a period of ten years prior to the institution of this suit under color of title, then you must find for the defendants.

And in this connection the court tells the jury that any deed or writing purporting to convey land constitutes color of title, and it makes no difference whether the color of title is a good or bad title, or whether the same has been lost or seen by anybody but the parties thereto, so it sufficiently describes the land.

No. 7—As Modified.

The court further tells the jury that unless it has been satisfactorily shown by a preponderance of the evidence that the deeds of May 12, 1908, and May 15, 1908, from Thompson and Jamison, respectively, to the plaintiff, Gent, covers the land in controversy, then they cannot find for the plaintiff more than a one-third interest in the land in controversy. And the court further tells the jury that if they believe from all the evidence that the boundaries of the said deeds are in such doubt and uncertainty that they cannot say they embrace the land in controversy, then they cannot find for the plaintiff more than a one-third undivided interest in the land in controversy.

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No. 8—As Modified.

The court further instructs the jury that in an action of ejectment, the defendant, who is in peaceable possession of land sought to be recovered is *prima facie* the owner and is entitled to hold the same against all the world except the true owner thereof, the true owner must show a preponderance of the evidence, a complete legal title and right to possession at the time of the institution of this action.

No. 17—As Modified.

The court instructs the jury that if they believe from the evidence in this case that Alexander Sutherland was in adverse possession of any part of the 207-acre tract of land under color of title, claiming to the extent of his boundary line prior to June, 1888, and that the 207-acre tract of land was wholly within the Richard Smith patent No. 27, that on the 27th day of August, 1888, Alexander Sutherland delivered a deed to, and possession of said tract of land of 207 acres, which included the land in controversy, to the defendants, in this case, who thereupon entered upon the same, or any part thereof, and cleared, cultivated, cut timber, paid taxes, improved and used the same for farming purposes, and held possession thereof, openly, notoriously, exclusively, and continuously for a period of ten years thereafter claiming the same under said deed, then good and perfect legal title to the said land so described in the said deed and each and every part and parcel thereof, was thereby vested in the defendants and they must find for them in this case. And the court further says if the defendants so entered upon any part of the land, described in the deed, by their father, Alexander Sutherland, and so held the possession of the same or any part thereof, for the said period of ten years the possession of the same or any part thereof was the possession of each and every part described in the said deed, and it makes no difference where such possession

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was if it was within the boundaries of the 207-acre tract described in the said deed to them by their father, so the same lies in grant No. 27 to Richard Smith; and if the jury so believes they must find for the defendants. And the court further tells the jury that if they believe Joe Skeen or Josh Elliott, or both of them, lived upon the said land, as tenants of the defendants, then their possession must be counted for the defendants.

No. 18—As Modified.

The court instructs the jury that if they believe from the evidence that prior to the date of the deed of R. B. Musick in June, 1888, Jesse Wampler executed a deed describing the land in controversy, and delivered the same to Alexander Sutherland, who was clearing or had cleared a portion thereof and that Alexander Sutherland, continued to clear, occupy and hold the land, described in the said deed from Jesse Wampler, or then entered thereon, or any part thereof, and continued to hold the same in the actual, continuous, and exclusive possession, until the 25th of August, 1888, and on that date or afterwards sold and conveyed the same to his sons and daughters, the defendants in this case, by writing describing the land in controversy and delivered to them the possession, and that they, the defendants in this case, continued to hold the lands, occupy, or possess the same in the continuous and exclusive possession, claiming the same as their own under the said deed, or deeds, and to the full extent of the boundary lines thereof for a period of ten years from the time that Wampler delivered the deed to the said Alexander Sutherland, at the end of the said period of ten years, a perfect legal title to the said land, and each and every part thereof, was thereby vested in the defendants, and after the end of the said ten years no statement of any of them could affect or divest, the same or any part thereof, and if the jury so believe they shall find for the defendants.

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No. 19—As Modified.

The court further tells the jury that after an adverse possession of a tract of land under color of title for ten years, has ripened into a perfect legal title thereto, then no statement afterwards can in anywise affect the title thus acquired, and the former owner of the legal title cannot recover in ejectment from a person whose title has so ripened.

No. 20—As Modified.

The court further tells the jury that the ejectment suit of Beam against Dock Sutherland cannot in any event affect the rights or interest of any of the other defendants than Dock Sutherland in this case, in any manner or any account, or affect their possession to the land claimed under the deed to the 207-acre tract.

No. 21—As Modified.

The court further tells the jury that unless they believe that the judgment for the land recovered in the ejectment suit of Beam against Dock Sutherland covers the land in controversy, or part thereof, and the burden is on the plaintiff to prove this, and the location and the extent thereof, by a preponderance of the evidence, then it cannot affect the possession any further than the plaintiff has shown it covers the land in controversy.

No. 22—As Modified.

The court instructs the jury that a recovery in ejectment of land in the actual possession of another does not affect his possession or stop, prevent, or suspend the running of the statute of limitations in his favor, unless a writ of possession issued on such judgment of recovery, or the party recovering, afterwards entered into possession in such a manner that if he had no title it would be a sufficient possession to be adversary possession against the true owner, and merely walking over, or surveying, without such pos-

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session is not sufficient. Neither is an agreement that a person recovering in the ejectment may enter thereon sufficient to suspend the running of the statute, unless there was such an entry and possession.

No. 23—As Modified.

The court instructs the jury that the ejectment suit of Beam against Dock Sutherland cannot be considered by you in locating the lands in any particular grant, or as a muniment of title to any part of the lands in controversy, but can only be considered by you in determining the character of Dock Sutherland's possession as to the land in controversy, whether adverse or not.

No. 24—As Modified.

The court further tells the jury that if they believe from the evidence in this case that the defendants held actual, open, adverse possession prior to the institution of this action of any part of the land in controversy for a period of ten years, continuously after the recovery in ejectment by Beam against Dock Sutherland in 1891, claiming under the deed of their father to them of August 27, 1888, and to the extent of the boundary lines of the said deed then they must find for the defendants.

W. W. Bird, T. L. Sutherland and S. H. & G. C. Sutherland,
for the plaintiff in error.

Finney & Wilson, for the defendants in error.

WHITTLE, P., delivered the opinion of the court.

This is the third appearance of this controversy in this court. The first appeal was from a decree enjoining appellants, at the suit of appellee, from cutting and removing timber from the land in controversy until the further order

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of the court. That decree was affirmed. *Sutherland v. Gent*, 111 Va. 511, 69 S. E. 340. At that time defendant in error had brought ejectment against plaintiffs in error to recover 267 $\frac{3}{4}$ acres of land situated in Russell county. And the trial of the action of ejectment resulted in a verdict and judgment for defendant in error, which judgment on writ of error was reversed by this court, and the case remanded for a new trial. *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713. The new trial again terminated in a verdict for the plaintiff, Gent, upon which the trial court entered the judgment under review.

The defendants filed a disclaimer as to the land included in the declaration, with the exception of 207 acres, to which they assert title by deed from their father, Alexander Sutherland.

The following excerpts from the opinion of this court on the last appeal will make plain one of the main questions in the case: "The plaintiff to connect his title with the Commonwealth put in evidence a deed from Richard Smith to the Warders, under date May 29, 1806, embracing a large boundary of land in Russell county. The deed recites that the entire tract was divided into various lots of 10,000 acres, 5,000 acres, and other quantities of land, each, for which separate patents had been taken out by the grantor, all of which were recorded in the land office. These various parcels amounted in the aggregate to 384,723 acres, more or less. The deed expressly reserves from the operation of the grant to the Warders a boundary of 50,000 acres sold and conveyed by the grantor to P. Francis De Tu Beuf, and also other lands referred to therein. * * * The theory of the plaintiff is that the land in dispute is part of block 27 of 5,000 acres of the Richard Smith survey, now known as the Warder land. * * * The opposing theory of the de-

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fendants is that the land is part of block 26, which adjoins block 27 on the west, and is within the 50,000-acre reservation."

Plaintiff attempted to prove by a witness, Albert, the county surveyor, that the land in controversy was within block 27; but his testimony disclosed that he had never surveyed that block and had no personal knowledge of the location of the northeast corner, the beginning point of his survey. His information mainly rested upon a statement made to him twenty years before the trial by a former agent of the Warders, who had since died, and whose competency to speak on the subject was not made to appear. The court, in dealing with that question said: "The evidence relied on to identify the beginning point of block 27 being inadmissible, it follows that the entire structure erected thereon must fall." And, chiefly for that error, the judgment was reversed.

When the case went back for a new trial, Albert, in obedience to a new order of survey, returned another survey and map, which with his testimony and that of other witnesses, together with documentary evidence, accurately located the beginning corner of block 27, and showed that the land in dispute lay wholly within that boundary and was not included in block 26, as contended by defendants. The evidence for the plaintiff further showed that he connected his paper title through the Warders with Smith, who, as remarked, held block 27 by grant from the Commonwealth.

Defendants did not undertake to connect their title with the Commonwealth, but rested their claim to the 207 acres upon adverse possession for ten years under color of title (the deed from their father, Alexander Sutherland). This feature of the controversy involves the doctrine of "lap," or interlock, between the senior title of the plaintiff and the junior title of defendants.

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That doctrine is very clearly stated in *Green v. Pennington*, 105 Va. 801, 54 S. E. 877, as follows: "Where one grant conflicts in part with another, occasioning an interlock, the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee, under his grant, acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which has already vested in the senior grantee. Where, in the case of conflicting grants, the junior patentee settles upon that portion of the land within the interlock, claiming the whole within his boundary, he thereby ousts the senior patentee of his constructive seisin and becomes actually possessed to the extent of his grant. Here possession of part is possession of the whole. But if his settlement is outside of the interlock, the possession of part is to be construed in reference to the conflict of boundaries, and, with whatever claim it be taken, it gives him possession of that part of the land only lying without the interlock. To overcome the constructive seisin in deed of the senior patentee and work an ouster, there must be an actual invasion of his boundary by some act or acts palpable to the senses and which would serve to admonish him that his seisin is molested."

The case, moreover, holds that in order to oust the constructive possession of the senior patentee, adverse possession continued for the statutory period after the date of the grant must be established.

It will be seen from the foregoing outline statement of the case that the record presents two major questions of controlling influence:

1. Has plaintiff shown that the 267 $\frac{3}{4}$ acres of land described in his declaration is included in block 27; and, if so,

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2. Have defendants shown adverse possession of, under color of title to, the 207 acres, or any part thereof, within the interlock, for ten years since the senior title of plaintiff accrued?

Both of these propositions involve jury questions, and both, upon highly conflicting evidence, were submitted to and passed upon by the jury in favor of the plaintiff. Therefore, a review of the evidence would be unprofitable. If the case has been fairly submitted to the jury upon the law, then their findings upon the facts, approved by the trial court, have passed beyond the cognizance of this court.

Innumerable questions of minor importance have been raised affecting the admission and exclusion of evidence, and the interpretation and authentication of documents of various kinds. Of all these exceptions, suffice it to say they have received respectful consideration, and concerning all of them, without more detailed notice, it may be remarked that we have found no reversible error therein.

Of the instructions, thirty-three in number, nine were requested by plaintiff and twenty-four by defendants. The court gave all of those asked by plaintiff, and of those prayed by defendants five were refused, eight were given, and eleven were modified. It may confidently be asserted that the instructions, as a whole, fully and correctly propounded the law upon every material question in the case. More than that cannot be required of a trial court.

We find no reversible error in the judgment of the circuit court, and it must be affirmed.

Affirmed.

Syllabus.

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TOWN OF APPALACHIA V. MAINOUS.

September 20, 1917.

1. **MULTIFARIOUSNESS—*Streets—Waiver of Bond of Contractor.***—Complainant in a bill in equity sought to redress a wrong done him as an individual, by the grading of a street in front of his premises, and also an injury to him as a citizen of a municipality, in that the bond required of the contractor for the grading had not been given and that a member of the street committee who was charged with the duty of assessing the damage to his property had an interest in the contract for doing the grading. As a waiver of the contractor's bond was within the discretion of the town council and not a matter of which a citizen could complain, the bill was not multifarious. The mere assertion of a right which the court will not enforce will not render a bill multifarious. The right sought to be enforced was within the discretionary powers of the council, with which the courts will not interfere, and the allegation that a member of the street committee was interested in the contract for grading is a mere incident of the gravamen of the bill and does not render the bill multifarious. As regards multifariousness, each case must be decided on its own facts.
2. **STREETS AND HIGHWAYS—*Bond of Contractor—Discretion of Council.***—Whether or not a bond should be required of the contractors for the grading of a street in the first instance is a matter resting entirely within the discretion of the council, and whether, if required, it should thereafter be waived rests equally within their discretion, and is not a matter of which a citizen could complain merely because in its absence a forfeiture could not probably be enforced.
3. **CERTIORARI—*Distinguished from Other Writs.***—*Certiorari* is a common-law writ, issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. At common law when not ancillary to other process, *certiorari* is in the nature of a writ of error. It has the same functions to inferior tribunals whose proceedings are not according to the course of the common law as the writ of error has to common-

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law courts. There is this difference, however, *certiorari* brings up the record for inspection only, while on error the proceedings below are superseded. It differs from appeal in that it brings up the case on the record, while on appeal the case is brought up on the merits; and from mandamus, for by that writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it.

4. **CERTIORARI—Use in Virginia.**—In Virginia there is no statute enlarging the scope of the writ of *certiorari*. Its use must be measured by the common law, and except to transfer a record from an inferior to a superior court, is so rare as to be almost obsolete.
5. **EQUITY—Jurisdiction—Adequate Remedy at Law—Certiorari.**—A property owner claimed that, without his fault, he had been deprived of the appeal given him by a statute by the action of a street committee in overruling, without his knowledge, his objections to the ascertainment of damages to his premises by grading the street in front thereof. Defendants demurred on the ground that complainant had a full, adequate and complete remedy at law by a writ of *certiorari*. As counsel for defendant admitted that the proceedings of the committee and council were regular on their face, and as *certiorari* brings up the record for inspection only, or in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein, the writ would have been of no value to complainant. In such case equity has jurisdiction, and the demurrer was properly overruled.
6. **INJUNCTION—Laches.**—Where a contract for grading a street was executed September 14th, work commenced about September 22d, and an injunction granted September 29th, there was no such unreasonable delay in applying for the injunction as should bar the complainant of relief.
7. **STREETS AND HIGHWAYS—Changing Grade—Ascertainment of Damages to Abutting Owners.**—The statute relating to the change of grade of a street in a town requires the town to give the abutting owner at least ten days' notice of a time and place to be designated in the notice, to show cause, if any he can, against the ascertainment of damages fixed by the committee to ascertain the same. It then provides: "Any one wishing to make objection to such ascertainment, so far as the same affects him, may appear in person or by counsel and state his objections. If his objections are overruled, he may within ten days thereafter, but not afterwards, have an appeal as of right * * * to the circuit court of the county in

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which said town is situated." It is further provided that the hearing on the appeal shall be *de novo*. Acts 1912, cl. 160, page 354.

Held: That where the owner's objections were never overruled as required by the statute, all proceedings based on the report of the committee of which the owner had neither notice nor knowledge until too late to appeal were null and void.

8. **STREETS AND HIGHWAYS—Changing Grade—Ascertainment of Damages to Abutting Owners.**—A decree of court requiring the council of a town to ascertain the damages, if any, which may accrue to the complainant by reason of the change of grade of the street in front of his property, and to proceed with all due diligence to grade and fill in the street fronting complainant's property in accordance with grades established by the town and shown by the report of its engineer, and further requiring the town to construct and complete a concrete sidewalk fronting complainant's property in accordance with established grades and in conformity to concrete sidewalks heretofore constructed on said street, is plainly erroneous, as it infringes upon the discretionary powers of the council.
9. **STREETS AND HIGHWAYS—Grading and Paving Streets—Discretion of Council.**—It is for the council of a municipality to determine in the first instance, what streets it will grade or pave, and what shall be the character of the grading or paving. In matters of this character, the decision of the council is, in the absence of fraud, final and conclusive, and cannot be controlled by the courts, unless the council transcends its powers.

Appeal from a decree of the Circuit Court of Wise county.
Decree for complainant. Defendant appeals.

Reversed in part.

The Town of Appalachia, desiring to grade certain of its streets and avenues, adopted a resolution June 30, 1914, directing the grading to be done, and designating and directing the street committee of said council, composed of E. L. Crizer, J. M. Cornett, and W. H. Johnson, to proceed by personal inspection of all premises likely to be effected by such grading, and ascertain what damages, if any, would

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accrue to the owners of such premises, and thereafter give notice of such ascertainment to such abutting owners, citing them to appear before the committee at a time and place to be specified in the notice to show cause, if any they had, against such ascertainment, and thereafter to make report of its proceedings to the council.

The committee viewed the premises of the appellee, and ascertained that no damage had been done to him, and notified him of a time and place when and where he could appear before the committee and show cause against the ascertainment. The appellee appeared at the time and place mentioned in the notice and stated to the committee his objections to the proposed action of the council. There is a sharp conflict between the witnesses as to what took place before the committee. The appellee contends that no action was taken by the committee, but that the matter was left open for future consideration, and especially for consideration of the proposal made by him to the committee. Upon this phase of the case, the trial judge heard the oral testimony of the witnesses and decided in favor of the appellee. This meeting was held August 3, 1914. Subsequently, on August 18, 1914, the committee filed with the clerk of the council a detailed report, in writing, of all its proceedings, which report the council confirmed, and by resolution accepted a bid of Beverly & Trinkle, for the work of grading, and authorized the mayor of the town to execute a contract with the firm for doing said work, and providing that the firm should execute the usual contractor's bond in the penalty of \$1,000. The contract for the grading was executed September 14, 1914, and the contractors commenced the work of grading about September 22, 1914.

On September 29, 1914, the appellee exhibited before the judge of the Circuit Court of Wise county, in vacation, a bill in chancery against the town of Appalachia, the street

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committee, and the said contractors, alleging that the said report of the said street committee, with respect to the action of said committee in overruling his objection to the ascertainment of damages to his premises, was untrue and misleading; that the said street committee did not act upon his said objections at the hearing before said committee on August 3; that he understood that the question was left open and undecided at said meeting and that it might be again taken up by said committee at some future time and that for these reasons he did not take an appeal from the alleged judgment of the committee within the time provided by law; that by reason of the premises and that without fault on his part, he had been misled by the action of said committee and deprived of his day in court. The bill further alleged that the said Beverly & Trinkle had been allowed to enter upon said work without having given the bond provided by the resolution of the council of said town and that said Beverly & Trinkle were men of limited means and without said bond the town would be unable to collect the forfeitures that might accrue under the said contract. The bill charged that the said contract, for these reasons, was void. The bill further alleged that E. L. Crizer, a member of the council of said town and a member of the said street committee, was directly and indirectly interested in the partnership of said Beverly & Trinkle, and in the said contract between said firm and the town, and charged that the action of same the said contract was void. The bill further alleged that great damage and irreparable injury was caused to the complainant's said premises by the grading of said street, and prayed for the said contract to be declared void; for defendants to be enjoined from further proceeding with said work; for all the proceedings of the said street committee, and its report with reference to its ascertainment of damages to complainant's property, and the proceedings of the council with reference thereto to

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aside; for a commissioner to be appointed to ascertain and report as to the damages to complainant's property; for the said street committee to be ordered and compelled to make a personal inspection of complainant's property, and ascertain and assess the damages occasioned thereto by the grading of said street, and for the complainant to be allowed to take an appeal from its finding, should he desire, or for the complainant to be now allowed an appeal from the alleged judgment of the said street committee; and for general relief.

Upon the presentation of said bill, the judge granted a temporary injunction, enjoining and restraining defendants from further proceeding with the work of grading said street.

The defendants demurred to and answered the bill, and after notice to appellee, made a motion before the said judge to dissolve the said injunction, which motion was heard on the 3rd day of October upon the bill of complaint, the separate demurrers and answers of defendants, and the oral testimony of witnesses. Upon the hearing of said motion the said demurrers were overruled, and the injunction was dissolved, with the exception of that portion of Kilbourn avenue immediately in front of appellee's premises, and as to said portion the said injunction was made permanent; the decree rendered upon said hearing being entered at the next term of said circuit court, on October 20.

The cause came on for hearing at the January, 1916, term of the said circuit court, upon the bill, the several answers, a copy of the evidence given before the judge in vacation, and the depositions of witnesses, and a final decree was rendered on the 16th day of January, 1916, setting aside the proceedings of the street committee in the ascertainment of damages to appellee's premises, and all subsequent proceedings of the said committee and the council of

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said town with reference thereto, upon the ground that said proceedings were irregular, informal and illegal; and requiring the council of said town, within sixty days, to proceed to designate and direct some commissioner thereof, or some officer of said town, to proceed to ascertain and assess the damages to appellee's premises by reason of the grading of said avenue, in accordance with the provisions of chapter 217 of Acts of 1908, as amended by Acts 1912, p. 354; and further requiring the said town, after such ascertainment of damages to proceed with all due diligence to fill in and grade the avenue in front of said premises in accordance with the grade established therefor, and in accordance with the original resolution adopted by the council on June 30, and to construct concrete sidewalks in front of said premises in conformity with concrete sidewalks theretofore constructed on said avenue; and decreeing costs against petitioners. From that decree this appeal was taken.

C. R. McCorkle, for the appellant.

Morton & Parker, for the appellee.

BURKS, J., (after making the foregoing statement) delivered the opinion of the court.

There was a demurrer to the bill and several grounds of demurrer were assigned, but only two of them are relied on in this court, to-wit: Multifariousness, and that the plaintiff has a full, adequate and complete remedy at law.

It is insisted that the bill is multifarious because the complainant seeks to redress a wrong done to him as an individual and also an injury to him as a citizen of the town of Appalachia, and that the two cannot be united in one bill.

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An inspection of the bill will show that, as to the injury to the complainant as a citizen, the charge is that the bond required of the contractor had not been given, and that a member of the street committee who was charged with the duty of assessing the damage to his property had an interest in the contract for doing the grading. Whether or not a bond should have been required of the contractors in the first instance was a matter resting entirely within the discretion of the town council and whether it should be thereafter waived rested equally within their discretion, and was not a matter of which a citizen could complain merely because in its absence a forfeiture could not probably be enforced. The mere assertion of a right which the court will not enforce will not render a bill multifarious. The right sought to be enforced was within the discretionary powers of the council, with which the courts will not interfere. 1 Dillon Mun. Corp. (4th ed.), sections 94, 95. The allegation that the member of the street committee was interested in the contract for grading is a mere incident of the gravamen of the bill and does not render the bill multifarious. The law relating to multifariousness has been so repeatedly stated by this court, and especially that each case must be decided on its own facts, that it is not deemed necessary to do more than cite a few of the more recent cases. *Fulton v. Cox*, 117 Va. 669, 86 S. E. 133; *Baker v. Berry Hill Co.*, 109 Va. 776, 65 S. E. 656; *Garrett v. Finch*, 107 Va. 25, 57 S. E. 604; *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330; *School Board v. Farish*, 92 Va. 156, 23 S. E. 221; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Hill v. Hill*, 79 Va. 592.

The second ground of demurrer relied on is that the complainant had a full, adequate and complete remedy at law by (1) ordinary action for damages, or (2) a writ of *certiorari*. The first of these grounds is abandoned by counsel for the appellants in his reply brief in the following language: "Counsel for the appellee are probably correct in

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their position that the matter became *res judicata* upon the expiration of the time for appeal, the proceedings of the committee and council being regular upon their face, and I therefore yield this point." The proceedings being regular on their face, it would seem that the matter in controversy was equally *res judicata* whether the party aggrieved proceeded by an ordinary action at law or by *certiorari*. We have no statute enlarging the scope of the writ of *certiorari*, and its use except to transfer a record from an inferior to a superior court, is so rare as to be almost obsolete. Its use, therefore, must be measured by the common law.

The writ is defined and distinguished from other writs in 6 Cyc. 737 as follows: "*Certiorari* is a common-law writ, issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. At common law when not ancillary to other process, *certiorari* is in the nature of a writ of error. It has the same functions to inferior tribunals whose proceedings are not according to the course of the common law as the writ of error has to common-law courts. There is this difference, however, *certiorari* brings up the record for inspection only, while on error the proceedings below are superseded. It differs from appeal in that it brings up the case on the record, while on appeal the case is brought up on the merits; and from *mandamus*, for by that writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it. In some of the States the statutory writ of review is a substitute for *certiorari*, and sustains substantially the same relation to the Code procedure as the writ of *certiorari* does to the common-law practice."

Much to the same effect are Prof. Minor and Mr. Barton: 4 Min. Inst. (3d ed.), pt. II, p. 1372; 2 Barton's Law Pr. (2d ed.), p. 1235.

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If, as stated in *Cyc., supra*, "*certiorari* brings up the record for inspection only," or, as stated by Minor, *supra*, the writ is issued "in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material *irregularity* therein," and counsel admit, as he does, that the "proceedings of the committee and counsel are regular on their face," it is not perceived that the writ would have been of any value to him. The ground of the equity jurisdiction alleged in the bill was, that the complainant, without fault on his part, had been deprived of the appeal given him by statute by the misconduct of the defendants in failing to let him know that his claim for damages had been rejected by the committee. In such case equity has jurisdiction, and the demurrer was properly overruled. *Louisville, etc., R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; *Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697; *Dey v. Martin*, 78 Va. 1.; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136.

As the complainant could not, for the reason stated, maintain an action at law to recover the damages alleged to have been sustained by him, he would have been without remedy altogether had not equity intervened, and the court committed no error in overruling the motion to dissolve the injunction on October 3, 1914. Neither was there any such unreasonable delay in applying for the injunction as should bar the complainant of relief. The contract for the grading was executed September 14, work commenced about September 22, and the injunction was granted September 29.

On the motion to dissolve the injunction, the trial court heard the testimony orally in chambers, and this testimony is certified in the record as a part of the evidence in the cause. It related chiefly to what transpired before the street committee when the complainant was notified to appear before them to show cause, if any he could, against the

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finding of the committee that he was not damaged by the proposed improvement. Six witnesses were examined on this subject, and their testimony is of the most conflicting character. These witnesses were the three members of the street committee, the mayor of the town, the complainant and one disinterested witness, J. B. Whitehead. Witnesses on behalf of the town insist that the complainant fully understood that they overruled his claim for damages, and yet none of them say he was told so in so many words, but only that he was insisting on having the grade lowered, or that he be paid for filling his yard to the proposed grade, and that they told him they could not or would not do that. They regarded that as settling the matter. On the other hand, the complainant insisted that no final action was taken by the committee; that he was led to believe that the matter would be taken up again, and that he would have a further opportunity of presenting his views, and in the event of an adverse decision he could exercise his right of appeal. He further testified that he had retained counsel to represent him in the event of an adverse decision, and that after the meeting of the committee he had time and again applied to the chairman to know what had been done and was each time assured that the matter was still unsettled, and that not until after it was too late for him to appeal did he learn that an adverse report had been made by the committee. Whitehead, the only disinterested witness on the subject, testified that the committee did not tell the complainant that he was not damaged, or that they had overruled his objection. He was asked and answered questions as follows: "What was done, if anything? Nothing done; all left the room and the street committee went with him (referring to a citizen who had come in and made complaint of water from the street overflowing his property) where this water was. Did they pass on any question of damages to Mr. Mainous' property or to the citation against

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him? No, sir." With the witnesses before him testifying in person, the trial judge decided that the committee did not at their meeting overrule the objection of the complainant to their report, or take any other final action thereon, and that he had no notice of their adverse finding until after the expiration of the time given by the statute in which to appeal. There was ample evidence to sustain this finding, and it will not be disturbed, even though, upon the evidence as it appears in the record, we may think that the apparent weight of the evidence is against it.

The statute relating to the change of grade of a street in a town requires the town to give the abutting owner at least ten days' notice of a time and place to be designated in the notice, to show cause, if any he can, against the ascertainment of damages fixed by the committee to ascertain the same. It then provides: "Any one wishing to make objection to such ascertainment, so far as the same affects him, may appear in person or by counsel and state his objections. If his objections are overruled, he may within ten days thereafter, but not afterwards, have an appeal as of right * * * to the circuit court of the county in which said town is situated." It is further provided that the hearing on the appeal shall be *de novo*. Acts 1912, cl. 160, p. 354. The trial court found that the owner's objections were never overruled as required by the statute, and that all proceedings based on the report of the committee of which the owner had neither notice nor knowledge until too late to appeal were null and void. This finding of the trial court is approved.

The decree appealed from, however, goes further and requires the council of the town to first ascertain the damages, if any, which may accrue to the complainant by reason of the change of grade of the street in front of his property, and to proceed with all due diligence to grade and fill in the street fronting complainant's property in accordance with

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grades established by the town and shown by the report of its engineer, and further requires the town to construct and complete the concrete sidewalk fronting complainant's property in accordance with established grades and in conformity to concrete sidewalks heretofore constructed on said street. This portion of the decree is plainly erroneous. It infringes upon the discretionary powers of the council. It is for the council to determine in the first instance, what streets it will grade or pave, and what shall be the character of the grading or paving. In matters of this character, the decision of the council is, in the absence of fraud, final and conclusive, and cannot be controlled by the courts, unless the council transcends its powers. 1 Dillon Mun. Corp. (4th ed.), section 94, and cases cited.

The injunction awarded the appellee in this cause should be now dissolved, and if the town of Appalachia desires to complete its improvement in front of appellee's property, it can do so on compliance with the statute above mentioned, and the rights of the appellee can be fully protected in that proceeding. If, however, the town should elect to proceed no further with its improvement, and the appellee has sustained any damage by reason of the grading already done, the way is open to him to maintain his action therefor as he is no longer barred by the action of the council which has been declared null and void.

A decree will be entered in this court dissolving said injunction and dismissing the complainant's bill, but without prejudice to the right of the town of Appalachia to proceed under the statute to complete its improvement, and, if it fails to do so, without prejudice to the right of the appellee to maintain his action for damages aforesaid. Costs will be decreed to the appellee as the party substantially prevailing.

Reversed in Part.

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VICARS V. WEISIGER CLOTHING COMPANY AND OTHERS.

September 20, 1917.

Absent, Sims, J.

1. **VENDOR AND PURCHASER—*Purchaser for Value and Without Notice—Latent Equities.***—A purchaser for value without notice, actual or constructive, will not be affected by a latent equity whether by lien, encumbrance, or trust, or fraud, or any other claim, and a grantee from such purchaser stands in the same position as his grantor, although such grantee was affected with notice at the time of the grant.
2. **VENDOR AND PURCHASER—*Purchaser for Value and Without Notice—Judgment Creditors.***—If a judgment debtor purchases land and procures it to be conveyed to another, and that other conveys it in trust to secure a *bona fide* debt, that creditor being ignorant that the judgment debtor had furnished the purchase money, the judgment creditor has no lien upon the land for his debt as against the creditor secured by the deed of trust.
3. **JUDGMENTS AND DECREES—*Docketing—Notice to Subsequent Purchasers.***—The docketing of a judgment is required to give notice to subsequent purchasers, but the docketing of a judgment against the judgment debtor gives no notice of the lien of the judgment upon land, the legal title to which stands in the name of another.
4. **FRAUDULENT CONVEYANCES—*Evidence.***—A suit was instituted for the purpose of subjecting certain lands to the lien of the judgments held by the complainants against P. and the bill alleged that P., at the time of and subsequent to the rendition of their judgments, was the true owner thereof, having paid all the purchase money therefor, and that the legal title thereto had been conveyed to his wife in fraud of his creditors, who had conveyed it to others, under whom defendants claimed. The evidence submitted as to the fraud upon P.'s creditors, if promptly presented, might have been sufficient to have shifted the burden of proof to him, but presented as it is was twenty years after the occurrences referred to, after P. has been a

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fugitive from justice for many years, and, according to one witness, was now dead, was utterly insufficient to support a decree against an innocent purchaser for value without notice.

5. **ESTOPPEL—Inconsistent Positions.**—One of the complainants in a suit to subject lands to the lien of judgments held by the complainants against one P. in a former suit had alleged that the property belonged to one B. It had received the benefit of that litigation and applied the proceeds of the sale of the property to the satisfaction of its judgment against B. and hence was precluded from assuming an inconsistent position in the instant case to the prejudice of the purchaser under decrees in the former suit.

Appeal from a decree of the Circuit Court of Russell county. Decree for complainants. Defendant appeals.

Reversed.

The opinion states the case.

Fulton & Vicars and *C. C. Burns*, for the appellant.

S. B. Quillen and *W. W. Bird*, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The appellees filed their bill in the Circuit Court of Russell county, Virginia, in November, 1910, alleging that they had judgments against one J. F. Porter, which constituted liens upon three tracts of land held by the appellant, A. M. Vicars, who had bought it in 1907 under decrees of the Circuit Court of Wise county entered in another chancery suit instituted in 1896 by the Weisiger Clothing Company, one of the appellees here, subjecting the same lands to the lien of its judgment against one John W. Bates.

The bill in the Wise county case alleged that the land had been conveyed to Mary Bates, the wife of John W.

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Bates, by Martha J. Porter; that John W. Bates had furnished the entire consideration therefor, and that the conveyance to Mary Bates was made with intent to hinder, delay and defraud her husband's creditors. The appellant having purchased the land at the said judicial sale in 1907 and fully paid therefor, and finding that the legal title to one of the parcels was still outstanding in H. S. Porter (though he had executed his title bond and deed to Martha J. Porter, which deed had never been delivered because the purchase price had not been fully paid) obtained a conveyance from H. S. Porter, and thus before the institution of this suit he had acquired the legal title to all of the property. This suit in Russell county was instituted for the purpose of subjecting the same lands to the lien of the judgments held by the appellees against J. F. Porter and the bill alleges that J. F. Porter, at the time of and subsequent to the rendition of their judgments, was the true owner thereof, having paid all the purchase money therefor, and that the legal title thereto had been conveyed to Martha J. Porter, his wife, in fraud of his creditors. It will be noted that this suit was not instituted until 1910, nearly twenty years after the alleged fraudulent transactions.

The circuit court decreed in favor of the appellees, and held that the judgments against Porter were liens upon this land.

1. The appellant alleges that he is an innocent purchaser of the said tracts of land for value and without notice of the alleged fraudulent conduct of J. F. Porter and Martha J. Porter his wife.

In *Moore and Others v. Sexton's Ex'or*, 30 Gratt. (71 Va.) 505, it is held that if a judgment debtor purchases land and procures it to be conveyed to another, and that other conveys it in trust to secure a *bona fide* debt, that creditor being ignorant that the judgment debtor had furnished the purchase money, the judgment creditor has no

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lien upon the land for his debt as against the creditor secured by the deed of trust; and it is stated in the opinion, in substance, that even though the judgment debtor had a secret equitable interest in the lot, the creditor's judgment lien could not so attach thereto as to overreach the legal title of a purchaser from the debtor for value and without notice. The docketing of the judgment is required to give notice to subsequent purchasers, but the docketing of the judgment against the judgment debtor gives no notice of the lien of the judgment upon land, the legal title to which stands in the name of another.

In *Rorer Iron Co. v. Trout and Wife*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285, it is held that purchasers for value without notice are not affected by latent equities; and grantees from such purchasers stand in the same position as their grantors, although such grantees were affected with notice at the time of the grant.

In *Snyder v. Grandstaff*, 96 Va. 477, 31 S. E. 648, 70 Am. St. Rep. 863, Judge Cardwell says this: "A purchaser for value and without notice is not affected by any latent equity. A mutual mistake stands on the same footing as any other equity. Kerr on Fraud and Mistake, page 436, specifically lays this down as to mistake: 'As against a *bona fide* purchaser for value without notice, no relief can be had in equity.' Almost the same words are used in Pomeroy on Equity, section 776. But the case of *Carter v. Allan*, 21 Gratt. (62 Va.) 241, and on this point it is cited with approval in *Rorer Iron Co. v. Trout*, *supra*, is directly in point. 'The doctrine that the courts of equity will not grant relief against *bona fide* purchasers without notice has always been adhered to as an indispensable muniment of title. It is wholly immaterial of what nature the equity is, whether it is founded on a lien or encumbrance, or trust, or a fraud, or any other claim; for a *bona fide* purchaser of the estate for a valuable consideration without notice purges away

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the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the violation of his trust and meditated fraud.' In *Rorer Iron Co. v. Trout*, *supra*, the same broad doctrine is laid down: 'It cannot be questioned at this day that the purchaser for value without notice, actual or constructive, will not be affected by a latent equity whether by lien, encumbrance, or trust, or fraud, or any other claim.' "

The doctrine is reiterated in *Rhea v. Shields*, 103 Va. 312, 49 S. E. 70, and in *Va. Iron Co. v. Bond*, 111 Va. 319, 68 S. E. 1005, and cannot be controverted.

These cases are conclusive, for there is neither allegation nor proof that John W. Bates or Mary Bates, under whom Vicars, the appellant, claimed, or Vicars himself, at the time he completed his purchase had any notice whatever that J. F. Porter, the judgment debtor ever had any equitable interest in or claim to the property. The evidence submitted as to the fraud upon Porter's creditors, if promptly presented, might have been sufficient to have shifted the burden of proof to him, but presented as it is twenty years after the occurrences referred to, after Porter has been a fugitive from justice for many years, and, according to one witness, is now dead, is utterly insufficient to support the decree, against an innocent purchaser for value without notice.

2. It is also true, as to the appellee, the Weisiger Clothing Company, that it is estopped to deny the validity of the sale to the appellant. In the former suit in Wise county it alleged that the property belonged to John W. Bates. It received the benefit of that litigation and applied the proceeds of the sale to the satisfaction of its judgment against Bates and is hence precluded from assuming an inconsistent position in this suit to the prejudice of Vicars, the purchaser under decrees in the former suit. *Rhea v. Shields*,

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103 Va. 312, 49 S. E. 70; *Hazel v. Lyden*, 51 Kan. 233, 32 Pac. 898; 37 Am. St. Rep. 273; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73; *Fallon v. Worthington*, 13 Colo. 559, 22 Pac. 960, 6 L. R. A. 708, 16 Am. St. Rep. 231; *Brewer v. Nash*, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749; *Rawles v. Jackson*, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185; *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 579; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *Johnson Brinkman Co. v. Railway Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 679, and cases cited.

From every point of view the decrees are erroneous, and this court will dismiss the bill.

Reversed.

Syllabus.

Staunton.

VIRGINIA IRON, COAL AND COKE COMPANY V. PROPHET.

September 20, 1917.

1. **MASTER AND SERVANT—*Mines and Minerals—Negligence—Sagging Electric Wires.***—A mining company is guilty of actionable negligence in suffering an electric wire to remain detached from its original fastenings, which held it in a safe position, and in permitting it to sag to such an extent as to become dangerous to its employees, where if the company had used ordinary care to inspect the mine, the dangerous condition of the wire would have been discovered, and where the attention of the "mine boss" in charge of the entry, where the wire was strung, had been specifically drawn to the situation. In the case at bar, it was the duty of the company to have warned plaintiff's intestate, its employee, of the unusual and extraordinary danger to which he was exposed by the sagging wire, and its negligence was the efficient and proximate cause of his death.
2. **APPEAL AND ERROR—*New Trial—Conflicting Evidence.***—In an action for death by wrongful act, the verdict of the jury for the plaintiff was rendered upon conflicting evidence and was approved by the trial court. From the standpoint of a demurrer to the evidence, the evidence was quite sufficient to sustain the verdict, and upon well-settled principles the Court of Appeals must accept the finding of the jury.
3. **MASTER AND SERVANT—*Injury to Servant—Instructions—Declaration.***—In an action for the death of a servant from contact with an electric wire, an instruction that it was the duty of the master to use care commensurate with the danger to inspect and maintain its wire is not erroneous, although there was no allegation in the declaration charging failure to inspect. The declaration charged that it was the duty of the company to use reasonable care to maintain the wire in a safe position, and the breach of that duty. The duty to inspect was a minor incident to the principal duty of properly maintaining the wire, and did not call for special averment.

Statement.

4. MASTER AND SERVANT—*Negligence of Master—Instructions.*—In an action for the death of a servant through the negligence of his master, an instruction which did not conclude with a direction to find for the plaintiff, but merely told the jury that the omission of the master to use ordinary care to make a fallen wire reasonably safe, after it knew, or by ordinary care might have known, of the defect, was negligence, states a correct proposition of law.
5. CONTRIBUTORY NEGLIGENCE—*Burden of Proof.*—In an action for the death of a servant by the negligence of his master, the burden of proving contributory negligence rested upon the defendant, unless the fact of such contributory negligence appeared from the plaintiff's own evidence.

Error to a judgment of the Circuit Court of Wise county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The following were the instructions for plaintiff referred to in the opinion:

1. The court instructs the jury that if they believe from the evidence that the defendants, Virginia Iron, Coal and Coke Company, had erected, and on the day the plaintiff's decedent was killed, maintained an electric wire along an entry in its mine charged with a dangerous current of electricity, then it became its duty to use care commensurate with the danger to inspect and maintain its said wire, while so charged with a dangerous current of electricity, to prevent injury to its employees who were lawfully in proximity to such wire, and liable to come in contact with it while in the discharge of the duties of their employment, and any failure upon the part of said defendant company to discharge such duty would be negligence.

2. The court instructs the jury that if they believe from the evidence that the defendant company, or its agents or employees in charge, knew, or by the use of care commen-

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surate with the danger, might have known that its wire, maintained for the purpose of running a pump in its mine, while charged with a dangerous current of electricity, had become detached from its proper position and had sagged down and lay along the side of the rib of coal, and in such position as to be liable to come in contact with, and to injure the said Asa Prophet while passing along the entry in the discharge of the duties of his employment, then it was the duty of the defendant to use care commensurate with the danger to make the said wire reasonably safe, and if it failed to do so it is guilty of negligence.

3. The court instructs the jury that the law presumes that Asa Prophet exercised due and proper care upon his part at the time he was killed, and the burden of proving that he was guilty of contributory negligence is upon the defendant, unless such negligence is proved by the plaintiff's evidence.

Bullitt & Chalkley and Jackson & Henson, for the plaintiff in error.

Bond & Bruce and Fulton & Vicars, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

The judgment under review was recovered by the defendant in error for the death of his intestate, Asa Prophet, which was imputed to the negligence of plaintiff in error. The material facts relative to the occurrence were these:

Prophet, who at the time of his death was nineteen years of age, with occasional intervals, had been in the employment of plaintiff in error, first as a "trapper" and later as a "coal digger," for four or five years. He had had

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very little experience as a driver and during his entire employment had not served in that capacity longer than "a week or such a matter." In May, 1915, while he was working as a coal miner, the company was "short a driver," and the driving boss asked him to drive in the "Jack Leg" entry on the night he was killed. He was not familiar with that part of the mine, and the driving boss testified that he went with him about 260 feet down the entry "to show him the haul, rather than the condition of the road, how to get the coal out."

The company operated an electric pump in the entry which was supplied with power over a non-insulated copper feed-wire, strung along the right hand side of the entry on the rib near the roof. The normal position of the wire at the point of accident was about eight feet ten inches above the rail. The driving boss further testified: "We went up to where the wire crossed (over the entry) and I showed him this wire and told him to be careful in turning the mules, to turn them to the left * * * as he might possibly get in the wire." The wire was strung on porcelain insulators spiked with large nails to blocks of wood driven in between the top of the coal and the roof. Four or five weeks before Prophet was killed, some of the insulators above the point of accident became detached from the blocks, and the wire swung down about two feet below its proper position to a point twenty or twenty-five feet from the place of accident. Subsequently, some two weeks prior to the accident, several of the insulators which hold the wire in position at the place of accident likewise came loose and the wire sagged until it reached the level of a man's shoulders, or about that height above the floor of the entry, and it remained in that condition until Prophet was killed. On that night he stopped his car near the switch points and walked down the entry to where Tom Gully, a miner, was working to ascertain whether he had a loaded car ready to be hauled out. In

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returning to his car, and when he had reached a point some nine feet distant from the front of it, he went to the side of the track in order to pass the mules and came in contact with the sagging wire and was killed.

If the company had used ordinary care to inspect this entry, the dangerous condition of the wire would have been discovered. And besides, four or five days prior to the accident the attention of the "mine boss" in charge of the entry had been specifically drawn to the situation. There was no rule of the company requiring drivers to use any particular side of the track; and in the entry in question the space along the sides of the track was variable, and the drivers were accustomed to utilize whichever side was most convenient. The switch, which it was Prophet's business to operate, was on the right hand side, and he violated no duty in using that side. He was making his second trip when killed, and had no notice of the sagging wire, which "got dusty in the black coal and was hard to see."

The case was submitted to the jury upon the opposing theories of the litigants. The contentions of the plaintiff below being: That the company was guilty of actionable negligence in suffering the wire to remain detached from its original fastenings, which held it in a safe position, and in permitting it to sag to such an extent as to become dangerous to employees; that the company should have warned Prophet of the unusual and extraordinary danger to which he was exposed; and that its negligence was the efficient and proximate cause of his death. The company, on the other hand, denied the fact that the wire was permitted to sag as claimed by the plaintiff, and insisted that the verdict of the jury was contrary to the law and the evidence. It also insisted that the court erred in overruling its motion for a new trial on that ground. Moreover, it contended that the trial court erred in giving instructions 1, 2 and 3, at the instance of the plaintiff.

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The jury's verdict for the plaintiff was rendered upon conflicting evidence and was approved by the trial court. From the standpoint of a demurrer to the evidence, the evidence is quite sufficient to sustain the verdict, and upon well settled principles this court must accept the finding of the jury. It may not be amiss, however, to add that, in our opinion, on all material issues the preponderance of the evidence was with the plaintiff.

The following are the exceptions to instructions:

Instruction one was objected to because it told the jury that it was the duty of the company to use care commensurate with the danger to inspect and maintain its wire, when there was no allegation in the declaration charging failure to inspect. The declaration charged that it was the duty of the company to use reasonable care to maintain the wire in a safe position, and the breach of that duty. The duty to inspect was a minor incident to the principal duty of properly maintaining the wire, and did not call for special averment.

It will be observed that instruction 2 did not conclude with the direction to find for the plaintiff, but merely told the jury that the omission of the company to use ordinary care to make a fallen wire reasonably safe, after it knew or by ordinary care might have known of the defect, was negligence. The instruction states a correct proposition of law.

Instruction 3 rightly informed the jury that the burden of proving contributory negligence rested upon the defendant, unless the fact of such contributory negligence appeared from the plaintiff's own evidence.

The case involves no new principles. It was fairly submitted to the jury on the law, and their verdict is sustained by the evidence.

The judgment is without error and must be affirmed.

Affirmed.

Syllabus.

Staunton.

WADKINS v. DAMASCUS LUMBER COMPANY.

September 20, 1917.

1. **APPEAL AND ERROR—*Successive Trials.***—The rule is that where there have been two trials the Supreme Court of Appeals must look first to the evidence and proceedings on the first trial, but where the evidence upon each of the last two trials was identical and the latter verdict the larger of the two, it follows that if there was no error to the prejudice of the plaintiff on the last trial, there could have been none on the former, even though there was a view of the premises by the jury on the former trial and not on the latter, where the judge of the trial court had the benefit of such light as the view might have shed upon the evidence, and it was clear that the final trial brought the case to the test under the most favorable possible circumstances for the plaintiff, since it gave him the benefit of the rules applicable to a demurrer to the evidence in the lower court as well as in the appellate court.
2. **APPEAL AND ERROR—*Demurrer to the Evidence—Motion to Set Aside.***—The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor. Accordingly, where the plaintiff assigns as error the action of the court below, first, in setting aside a verdict in his favor, and, second, in sustaining defendant's demurrer to the evidence, the appellate court will consider only the action of the court below upon the demurrer to the evidence.
3. **MASTER AND SERVANT—*Safe Place to Work.***—Plaintiff, an employee of defendant, was injured by having his hand caught and pulled into the cogs and gearing of two wheels which operated a part of the machinery of the defendant's sawmill. At the time of his injury he was attempting, with a small stick, to put some tar upon the wheels. The place where he was standing was as safe as any other place would have been with the same sort of machinery in operation around it. The construction of the defendant's plant and the installation of its machinery conformed to that of similar plants in general use in the country. As the machinery and not the place where he

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worked constituted the danger and caused the injury to plaintiff, an allegation that defendant had not exercised ordinary care to furnish the plaintiff a reasonably safe place in which to work was not sustained by the evidence.

4. **MASTER AND SERVANT—Liability of Master—Safe Machinery and Appliances.**—Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business.
5. **MASTER AND SERVANT—Liability of Master—Duty to Warn Servant.**—Plaintiff was injured while attempting, with a small stick, to put tar upon the wheels operating a part of the machinery of defendant's sawmill. He was a competent and intelligent man, who had worked for the defendant about three years in and around the plant. The dangerous character of the machinery itself was perfectly open and obvious to any man of ordinary intelligence, and there was no duty upon the defendant to warn plaintiff of its dangerous character. Moreover, plaintiff had been assigned to oil the machinery for a few days and there was no evidence that he had been directed to use any tar anywhere, and there was no reason for his master to expect that he would use it. He voluntarily and gratuitously undertook something which he was not ordered or expected to do, and has no legal cause of complaint.

Error to a judgment of the Circuit Court of Washington county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

L. P. Summers, for the plaintiff in error.

Hutton & Hutton and White, Penn & Penn, for the defendant in error.

KELLY, J., delivered the opinion of the court.

Opinion.

This is an action for damages for personal injuries sustained by the plaintiff, John A. Wadkins, while at work for the defendant, Damascus Lumber Company. There were three trials. On the first, the jury failed to agree; on the second, there was a verdict for the plaintiff for \$900, which the court set aside; and, on the third, a verdict for \$1,000, subject to the opinion of the court upon the defendant's demurrer to the evidence. The court sustained the demurrer and entered up a final judgment for the defendant.

The plaintiff brings the case here, and assigns as error the action of the court, first, in setting aside the former verdict, and, second, in sustaining the demurrer to the evidence.

The rule is that where there have been two trials this court must look first to the evidence and proceedings on the first trial, but, in the present case, the evidence upon each of the last two trials was identical, the latter verdict was the larger of the two, and it necessarily follows that if there was no error to the prejudice of the plaintiff on the third, there could have been none on the second trial. It is true that there was a view of the premises by the jury on the second trial and no view by them on the third, but the judge of the trial court had the benefit of such light as the view may have shed upon the evidence, and it is clear that the final trial brought the case to the test under the most favorable possible circumstances for the plaintiff, since it gave him the benefit of the rules applicable to a demurrer to the evidence in the lower court as well as here. In other words, the position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor (*Chapman v. Real Estate Co.*, 96 Va. 177, 188, 31 S. E. 74; *Cardwell v. N. & W. R. Co.*, 114 Va. 500, 506, 77 S. E. 612; *Burks Pl. & Pr.*, pp. 762-4); and we shall, therefore consider only the action of the court upon the demurrer to the evidence.

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The plaintiff was injured by having his hand caught and pulled into the cogs and gearing of two wheels which operated a part of the machinery of the defendant's sawmill plant. At the time of his injury he was attempting, with a small stick or paddle, to put some tar upon these wheels, because, as he thought, they were "cutting" and needed tar.

The case was tried upon two allegations of negligence (stated here inversely from their order in the declaration), first, that the defendant had not exercised ordinary care to furnish the plaintiff a reasonably safe place in which to work; and, second, that the defendant assigned the plaintiff to the duty of oiling and tarring the machinery in the mill without instructing him about the work and warning him against its dangers.

(1) The evidence wholly fails to make out a case for recovery upon the first charge of negligence. The place where he was standing was as safe as any other place would have been with the same sort of machinery in operation around it. It was the machinery and not the place where he worked that constituted the danger and caused his injury. Some effort was made to show that the defendant ought to have provided some sort of frame-work to protect the employees against the danger of being caught in the machinery, but, in addition to the proof that such devices would not have helped the situation for the plaintiff, the uncontradicted evidence is, further, that the construction of the defendant's plant and the installation of its machinery conformed to that of similar plants in general use in the country. "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business." *Southern Ry. Co. v. Lewis*, 113 Va. 117, 119, 73 S. E. 469, 470, and cases cited.

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(2) Nor do we think the evidence tends to show any breach of duty to instruct and warn the plaintiff with reference to his work. He was a competent and intelligent man, about fifty-three years of age, and had been working for the defendant for about three years, during which time he had been variously employed in and around the plant, and had necessarily become entirely familiar with the premises and structures and the general character and purposes of the machinery installed there. If he had a regular and stated work, it probably was that of picking lath stock, but he was regarded by the superintendent, and evidently regarded himself, as a general laborer, being assigned from time to time to various kinds of work, some probably more dangerous and some less dangerous than oiling machinery. He had, for example, operated several machines, including the "slasher," a machine consisting of a number of saws; he had frequently put tar on cog-wheels elsewhere in the mill which operated much more rapidly than those by which he was injured; he had "fed spans" to cut laths in the lath mill; and he had been engaged at times as a sort of watchman to stay at the plant for an hour or two after the plant closed at night to look out for hot boxes about the machinery, and to report anything else that might be out of order. A few hours before he was hurt he said to another employee, "I haven't been here as long as some of the men, but I can do anything that comes up."

Having this general and special experience and acquaintance with the plant and its operation, he was asked by the superintendent, about ten o'clock in the morning of the day on which the accident occurred, to take the oiler's place for a few days, and he readily consented to do so. He was not directed to use any tar. It is true that he says in the outset of his testimony that the superintendent wanted him to "oil and tar," but he repeatedly and emphatically admits in the course of his examination that he was merely requested "to oil" for two or three days, and that tarring

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was not mentioned to him at all. There is evidence that it was the duty of the oiler to use tar when necessary but it also appears conclusively and without contradiction that the plaintiff had never seen anybody use tar on the wheels where he was hurt; that the oiler whose plaintiff took temporarily had never done so; and that the superintendent did not expect and had no reason to expect the plaintiff would do the unusual and improbable which he was doing when he got hurt.

When the plaintiff was assigned to this work as he was directed to call on an assistant machinist Milhorn to "make a round with him," and he did so the following result, as disclosed by his own statement: "Milhorn just said to me he had just oiled and it was worth while for him to make a round with me then, and he told me to eat my dinner just before the whistle blew at 12 o'clock and be ready to oil back under the trimmer where there were several little wheels and chains, belts, one thing or another. He said for me not to go in there at the upper end while it was running—at the upper end up under the trimmer; and I eat dinner then and got ready just before the whistle blowed and after the whistle blew I oiled what Milborn told me to while it was standing still up at the upper end and as I came back down the plankway coming down the side of this machinery where I got caught, I noticed it was cutting right smartly, and I thought that after a while I would put some tar on it." The plaintiff had previously thought this machinery needed tar and had called it to the attention of the regular oiler, who had disregarded the suggestion. Without asking Milhorn a word about it, the plaintiff, upon his own judgment and initiative, without a suggestion or direction from any source, and without any precedent, what he was doing, procured a bucket of tar and attempted to put it on while the machinery was in motion, to put some of it on the gearing. The machinery at that point consisted of a large wheel, a small one about six inches in diameter driven

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the cogs of a larger one about thirty-two inches in diameter. He stood on a platform immediately facing these two wheels and first tried with a very short paddle which he himself had made, to apply the tar to the large wheel. The weather was cold and the tar was stiff, and he soon found that it would not work off of the paddle on to the big wheel. He then tried to apply it to the smaller one which he knew revolved more rapidly. The tar stuck to the wheel and the plaintiff failed or was unable to let go the paddle until he had been drawn into the gearing and grievously injured.

The dangerous character of the machinery itself was perfectly open and obvious to any man of ordinary intelligence, and as to that danger there was certainly no duty upon the defendant to warn this seasoned and experienced employee. *Jacoby Co. v. Williams*, 110 Va. 62, 65 S. E. 491, and authorities there cited.

It is insisted that in applying tar to machinery in cold weather it should be heated; that the plaintiff did not know this; and that he should have been informed upon that point. It can hardly be said, however, that the evidence shows, or could have shown, that the plaintiff did not know about the sticky quality of tar. "Uncle Remus" very safely assumed that even the youngest and least experienced of his multitude of youthful friends would recognize this simple fact in one of his most popular nursery stories. If plaintiff's common knowledge and his acknowledged previous experience with tar (at the same time of year) had not taught him that this substance would become stickier as the weather got colder, he had certainly discovered that fact before he was injured, as appears from the following extracts from his testimony:

"Q. Tell the jury what happened? A. I was rubbing it on, up against the wheel like. Q. Which wheel, the big one or the little one? A. The little one. The big one run so slow. I tried to rub it on it and could not get it off and had to rub it on the other one with the paddle, and it

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jerked my hand into the thing. * * * Q. You thought you could grease with the paddle without being jerked in? A. Yes, sir, I thought I could rub the tar off without being jerked in. * * * I didn't think I would get caught. It jerked me in there unthoughted to me. The tar was tough and hard to get out and it jerked me in there unthoughted."

Moreover, as we have seen, no order was given the plaintiff to use tar anywhere, and there was no reason for the superintendent to expect that he would use it. He voluntarily and gratuitously undertook something which he was not ordered or expected to do, and has no legal cause of complaint. *Eckles v. N. & W. Ry. Co.*, 96 Va. 69, 71, 25 S. E. 545; *Jacoby Co. v. Williams*, *supra*.

There is no view of the case in which a verdict for the plaintiff could be sustained.

The judgment is affirmed.

Affirmed.

Staunton.

WOHLFORD v. WOHLFORD.

September 20, 1917.

1. **FRAUDS, STATUTE OF—*Parol Gift of Land—Contract for Gift to be Perfected by Will.***—Prior to May 1, 1888, the date upon which the Code of 1887 took effect, a parol gift or a promise of a gift of land, to be consummated by deed, if followed by improvements on the land, was enforceable under the doctrine of such cases as *Halsey v. Peters*, 79 Va. 60; and a contract for a gift to be perfected by will, under similar circumstances, was enforceable under the doctrine announced in *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741. But in view of the history and apparent purpose of section 2413 of the Code of 1904, which first made its appearance in the Code of 1887, no such contract is now enforceable. That section provides that no right to a conveyance of an estate of inheritance or freehold, or for a term of more than five years in lands, shall "accrue to the donee of the land, or those claiming under him, under a gift or promise of gift of same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee, or those claiming under him."
2. **FRAUDS, STATUTE OF—*Parol Gift of Land—Contract for Gift to be Perfected by Will.***—In the case at bar, it was contended on behalf of the appellant that section 2413 of the Code of 1904 had no application, because the alleged contract was based upon a valuable consideration, to-wit: the complainant's change of position by leaving his own farm and bestowing his labor and care upon that of another, and the sale of his own land and application of the proceeds to improvements upon the place with reference to which he had a parol contract. But in this respect, the case cannot be distinguished in principle from *Halsey v. Peters*, 79 Va. 60, the doctrine of which and the other Virginia cases of that type, section 2413 of the Code of 1904 was expressly designed to abolish.
3. **WILLS—*Testamentary Capacity—Undue Influence.***—A father in his last days totally disinherited his son by a deed and a will because of certain rumors relating mainly to his son's

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attitude and conduct towards him, which had some foundation in fact, but which the son could apparently have satisfactorily explained if his father had been willing to give him a fair hearing and listen to a reasonable explanation. It did not appear from the evidence that the father's disposition of his property could be attributed to mental incompetency, for the evidence conclusively shows that he was entirely capable of transacting business when he made the change in his will and when he executed the deed; nor to undue influence from others, for he is shown to have been a man of strong purpose, and there is no evidence, except possibly by way of inference, that any person or persons attempted to influence or control him in the matter; nor was it due to what the law recognizes as an insane delusion, for although the rumors of what his son had said and done were evidently exaggerated in his own imagination, as a result of his high temper and suspicious disposition, and probably as a result of inaccurate information, these rumors were nevertheless founded upon actual occurrences.

Held: That the lower court did not err in holding that the father at the time of the execution of the deed and will attacked, was possessed of the requisite mental capacity to make the same, and that these papers were not rendered invalid by any undue influence brought to bear upon him.

4. *WILLS—Testamentary Capacity.*—As a general rule the right of a testator to dispose of his estate as he likes depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and, as to his relatives, all that is required of him at the time of making his will is that he shall possess ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them to consideration. In determining whether certain relatives are such objects, he must possess ability to reach a rational conclusion, however erroneous or unjust, with reference to them. Hence, ordinarily, capricious and arbitrary likes and dislikes of his relatives who are the objects of his bounty, or should be, are not evidence of insanity or a want of mental capacity to make a will, on the part of a testator who entertains such likes or dislikes.

Appeal from a decree of the Circuit Court of Wythe county. Decree for defendant. Complainant appeals.

Affirmed.

Opinion.

The opinion states the case.

E. Lee Trinkle and *W. B. Kegley*, for the appellant.

W. S. Poage and *S. B. Campbell*, for the appellee.

KELLY, J., delivered the opinion of the court.

This is a controversy between Frank B. Wohlford and his brother, George C. Wohlford, concerning the ownership of a tract of land called the "Nye Place," formerly owned by their father, the late George M. Wohlford.

Early in the year 1911, Frank B. Wohlford, at the instance of his father, left his own home, some miles away, and moved to the Nye place, where he has ever since resided. On December 30, 1911, his father (who lived until June 14, 1915) made a will in which he devised the Nye Place to his son Frank, but added a codicil on July 13, 1914, by which he revoked this devise and gave the place to his son George, thereby leaving Frank entirely out of any share or part in the distribution of his estate. Still later, February 19, 1915, he made a deed to George for the Nye Place, and the latter shortly thereafter brought an action of unlawful detainer against Frank to recover the possession. Thereupon, Frank B. Wohlford instituted the present suit in equity to enjoin the prosecution of the action of unlawful detainer, to set aside and annul the codicil and the deed to his brother George, and for general relief.

The original, amended and supplemental bills (hereinafter referred to as the bill) upon which the cause was heard in the circuit court, placed the complainant's claim to relief upon three grounds: First, a parol contract with his father by virtue of which he claimed to be entitled to hold the Nye Place as his own; second, the mental inca-

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capacity of his father at the time of the execution of the codicil and deed, and, third, the undue influence which he alleged had been exerted over his father by the latter's wife and daughter (complainant's stepmother and half sister) and other members of the family.

There was a demurrer to the bill, which was sustained as to the alleged contract, and the averments in regard thereto were stricken out by the court; but the demurrer was overruled as to the remaining allegations. The defendant, George C. Wohlford, then answered the bill as thus limited, denying its allegations as to his father's mental incapacity and the undue influence exerted upon him; and on these two issues a large volume of testimony was taken. Upon final hearing the court entered a decree, holding that George M. Wohlford was mentally competent to make the codicil and deed and was not unduly influenced to do so, and dismissing the bill at the cost of the complainant. From this decree Frank B. Wohlford brings this appeal, assigning as error the action of the court, first, in sustaining the demurrer to the part of the bill relating to the alleged contract, and, second, in decreeing against the complainant as to the remaining allegations upon the final hearing.

Taking up these assignments in their order, we are of opinion that the court was right in holding that the bill did not set forth a contract which the complainant could specifically enforce. The substance of this contract, as alleged, was that the complainant was induced to leave his Stony Fork farm, where he had lived for several years, and move with his family to the Nye Place, and subsequently to sell the Stony Fork farm and apply the proceeds, as well as his subsequent labor and earnings, to improvements on the Nye Place, upon the express promise and assurance of his father that the place should belong to the complainant absolutely at his father's death and should be devised to him by the latter's will.

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Prior to May 1, 1888, the date upon which the Code of 1887 took effect, a parol gift or a promise of a gift of land, to be consummated by deed, if followed by improvements on the land, was enforceable under the doctrine of such cases as *Halsey v. Peters*, 79 Va. 60; and a contract for a gift to be perfected by will, under similar circumstances, was enforceable under the doctrine announced in *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741. But in view of the history and apparent purpose of section 2413 of the Code of Virginia, which first made its appearance in the Code of 1887, no such contract is now enforceable. That section provided that no right to a conveyance of an estate of inheritance or freehold, or for a term of more than five years in lands, shall "accrue to the donee of the land, or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee, or those claiming under him."

It is earnestly contended on behalf of the appellant that this section has no application to the instant case, because the alleged contract was based upon a valuable consideration, to-wit: the complainant's change of position by leaving his own farm and bestowing his labor and care upon that of another, and the sale of his Stony Fork land and application of the proceeds to improvements upon the Nye Place, but the case in this respect cannot be distinguished in principle from that of *Halsey v. Peters*, *supra*. As indicated above, if the law were now as it was when *Halsey v. Peters* was decided, the complainant would be entitled to the relief he seeks, because he would have a contract with reference to the Nye Place which, under the doctrine of *Burdine v. Burdine*, *supra*, would have charged it with a trust enforceable in a court of equity. It seems clear, how-

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ever, that section 2413 was expressly designed to abolish the doctrine of *Halsey v. Peters* and the other Virginia cases of that type.

In the case of *Nicholas v. Nicholas*, 100 Va. at page 664, 42 S. E. 670, Judge Keith, in dealing with a gift from a father to a son, uses the following language: "The terms of section 2413 seem necessarily to embrace such transactions as that under investigation, and the cases cited by the revisors in connection with that section show that gifts of land by a parent to a child were within the contemplation of those who prepared the section. *Burkholder v. Ludlam*, 30 Gratt. (71 Va.) 255, [32 Am. Rep. 668]; *Stokes v. Oliver*, 76 Va. 72; *Griggsby v. Osborn*, 82 Va. 371."

Judge E. C. Burks, one of the revisors of the Code of 1887, in speaking of the changes wrought by section 2413, says: "Even a parol *gift of land*, if possession was taken by the donee and a large expenditure was made by him in improving the land, was treated in equity as a valid sale, and was allowed to be set up on oral testimony alone. This was a most prolific source of fraud.

"Voluntary partition, also, of land by coparceners, was considered as not within the operation of the statute requiring a deed to convey an estate of inheritance or freehold, and therefore partition by parol was upheld.

"In both of these instances the law was changed by the revision so as to require writing." Burks' Address, 4 Va. Bar Association Reports, 117, 118.

Professor John B. Minor, in commenting upon section 2413, says, "that in Virginia, in case of a *gift without valuable consideration*, though followed by possession and valuable improvement of the land, the exposition following (relating to specific execution of parol contracts for real estate) must be taken with the needful allowance for the pro-

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visions of the foregoing statute; and hence the statute overrules the cases of *Halsey v. Peters*, 79 Va. 60, and *Griggsby v. Osborn*, 82 Va. 373."

The instant case presents no stronger facts upon which to claim that the gift was based upon a valuable consideration than did the case of *Halsey v. Peters*, and we think, therefore, that it must be accepted as settled law in Virginia that contracts of the character here involved are expressly invalidated by the statute in question.

Passing now to the second assignment of error, we are further of opinion that the court did not err in holding that George M. Wohlford, at the time of the execution of the codicil and deed attacked in this case, was possessed of the requisite mental capacity to make the same, and that these papers were not rendered invalid by any undue influence brought to bear upon him. A protracted discussion of this branch of the case would serve no good purpose. The rules of law to be applied are well settled (*Wooddy v. Taylor*, 114 Va. 737, 77 S. E. 498); and the evidence in the case is too voluminous to admit of any particularized discussion. We have considered the testimony carefully and we have no doubt as to the correctness of the lower court's finding upon the facts.

The action of Frank Wohlford's father appears to us, and doubtless appeared to the circuit court, as unkind, unnatural and unfair. The record presents a peculiarly distressing and pathetic spectacle of a father, always high strung and easily offended, turning in his last days against a son for whom he had previously seemed to entertain especial affection, and totally disinheriting him because of certain rumors relating mainly to his son's attitude and conduct towards him, which had some foundation in fact, but which the son could apparently have satisfactorily explained if his father had been willing to give him a fair hearing and listen to a reasonable explanation. This change

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of feeling upon the part of George M. Wohlford cannot, as we think, properly be attributed to mental incompetency, for the evidence conclusively shows that he was entirely capable of transacting business when he made the change in his will and when he executed the deed. It was not due to undue influence from others, for he is shown to have been a man of strong purpose, and there is no evidence, except possibly by way of inference, that any person or persons attempted to influence or control him in the matter. It was not due to what the law recognizes as an insane delusion, for although the rumors of what his son had said and done were evidently exaggerated in his own imagination, as a result of his high temper and suspicious disposition, and probably as a result of inaccurate information, these rumors were nevertheless founded upon actual occurrences. His wife and daughter and certain other members of the family seem to have shared and encouraged his belief and feeling, and certainly they did nothing to quiet and reconcile him; but we think it is clear that his action, unwise and unjust as it appears, was primarily due to his own unyielding temper and unforgiving disposition. Such cases cannot be remedied by the courts, but fall within principles which are so well expressed and fortified by authority in a note to the case of *McDonald v. McDonald*, 117 Am. St. Rep. 582, that we shall conclude this discussion by the following extract therefrom: "It may be safely stated that as a general rule the right of a testator to dispose of his estate as he likes depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and, as to his relatives, all that is required of him at the time of making his will is that he shall possess ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them to consideration. In determining whether certain relatives are such objects, he must possess ability to

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reach a rational conclusion, however erroneous or unjust, with reference to them. *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11. Hence, ordinarily capricious and arbitrary likes and dislikes of his relatives who are the objects of his bounty, or should be, are not evidence of insanity or a want of mental capacity to make a will on the part of a testator who entertains such likes or dislikes. *Estate of Spencer*, 96 Cal. 448, 31 Pac. 453; *Pelamourges v. Clark*, 9 Iowa, 1; *Sherley v. Sherley*, 81 Ky. 240; *Barnes v. Barnes*, 66 Me. 286; *Trumbull v. Gibbons*, 22 N. J. Law 117; *Coit v. Patchen*, 77 N. Y. 533; *Matter of Will of White*, 121 N. Y. 406 [24 N. E. 935]; *Chaney v. Bryan*, 16 Lea (84 Tenn.) 63; *Will of Code*, 49 Wis. 179 [5 N. W. 346]. People may hate their relatives for bad reasons, and not be deprived of testamentary capacity. *Carpenter, Estate of*, 94 Cal. 406 [29 Pac. 1101]. Prejudice, hatred, ill-will and the exhibition of violent passions on the part of one formerly affable do not prove a want of mental capacity to make a will. *Sherley v. Sherley*, 81 Ky. 240. And resentment of a testator against his son not amounting to a delusion, will not vitiate a will prejudicial to such son, made in accordance with previously declared intentions. *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

"Or the fact that a testator gave his daughter a comparatively small portion of his property, after there had been an estrangement and quarrel between them, cannot be considered as of any weight on the question of his mental capacity to dispose of his property by will. *Meeker v. Meeker*, 75 Ill. 260. That a man became prejudiced against some of his children without sufficient cause, and made unjust remarks against them not warranted by the facts does not show that he has insane delusions, or was devoid of testamentary capacity, because an owner of property who has capacity to attend to ordinary business has the right to dispose of it by will as he may choose, and if he is capable of

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acting rationally in the ordinary affairs of life so that he may comprehend what disposition he may wish to make of his property, and be able to select the objects of his bequest, he is capable of making a valid will. *Schneider v. Ma* 121 Ill. 376 [12 N. E. 267].

"A testator may have his preferences, dislikes, and animosities toward his heirs, and may be guided by them in the disposition of his estate by will, yet if he is competent of mind and makes his will freely and voluntarily, these conditions of mind will not *per se* destroy his will for want of testamentary capacity, and though such prejudice may be unfounded, still if they are not used to coerce and control his will or impose a fraud upon him, they will not avoid his will. *Carter v. Dixon*, 69 Ga. 82. Or the fact that the provisions of a will are unjust or are the result of passion toward children, or of unworthy or unjustifiable sentiment, or of false information toward them, is not sufficient to invalidate the will. *Buchanan v. Belsey*, 65 App. Div. 501, 100 N. Y. Supp. 601]."

Having reached the conclusions above announced, it comes unnecessary for us to notice the cross-error assigned by the appellee and based upon the contention that the will of George M. Wohlford, having been duly admitted to probate, could not be collaterally assailed.

There was no error in the decree complained of, and the same is affirmed.

Affirmed.

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Staunton.

ZIMMERMAN COMPANY, INCORPORATED, AND OTHERS V. DEY
AND OTHERS.

September 20, 1917.

1. **VARIANCE—Bill in Equity—Suit to Annul Tax Deed.**—Where the gravamen of a bill was that the defendant obtained a tax deed without complying with the statutory requirements in the matter of his payments to the clerk, and facts were offered in evidence which tended to support the fundamental charges and general purposes and prayer of the bill, but which were at variance with specific averments therein, the proper way to take advantage of the variance would have been to object to the evidence. This would have given the complainant an opportunity to amend the pleadings and would have worked prejudice to neither party.
2. **VARIANCE—Bill in Equity—Suit to Annul Tax Deed—Agreed Statement of Facts.**—There is no rule of pleading or any reason or authority that denies one litigant the benefit of a fact germane to the gist of his suit or action, even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the case.
3. **TAX SALE—Title in Commonwealth—Assessment Against Former Owner.**—When a sale is made to the Commonwealth for delinquent taxes, as in this case, the title thereafter remains in the Commonwealth until it is divested by a redemption or a purchase in the manner prescribed by law. Until one of these events takes place, there can be, properly speaking, no further assessment of the property against the former owner for taxation, for the plain reason that the property belongs to the State.
4. **TAX SALE—Sale to the Commonwealth—Redemption—Purchase from the Commonwealth.**—Where land is sold to the Commonwealth for delinquent taxes it is thereafter to be carried on the land books, as required by section 469 of the Code of 1904, in the name of the former owner, but with a notation of the sale to indicate its status. When a former owner re-

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deems, or a third person purchases, he will be required to pay to the clerk, along with certain fees and penalties, such sums as would have accrued for taxes if no sale to the Commonwealth had been made. If after the sale to the Commonwealth the land by apparently regular proceedings is assessed against the former owner and the taxes paid by him, it would be just, whether strictly according to law or not, for him to be given credit for such payments when he undertakes to redeem. But there is no reason why a third person, who purchases the land from the Commonwealth, should be permitted to appropriate to his benefit such payments by the former owner, and the statute prevents him from so doing. In such case the purchaser under section 666, Code of 1904, must pay the taxes for the intervening years between the purchase by the Commonwealth and his own purchase, whether paid by the former owner or not.

5. **TAX DEED—Validity—Sections 661 and 666, Code of 1904.**—In order to invoke and be entitled to the benefit of section 661, Code of 1904, he who has acquired a tax title, such as the one involved in the instant case, must have acquired it in accordance with the requirements of section 666; that is, section 661 was not intended to make a tax title good unless it has been acquired as the statute says, "in pursuance of section 666."
6. **TAX DEED—Validity—Compliance with Section 666, Code of 1904—Case at Bar.**—Suit was brought to annul a tax deed upon the ground that the purchaser was not required to comply with section 666, Code of 1904, by paying to the clerk "the amount for which the sale to the Commonwealth was made and the taxes and county levies to the city, town or county or district in which the land is situated, *together with such additional sums as would have accrued from taxes, levies and interest if such real estate had not been so purchased by the Commonwealth, etc.*" The particulars in which it was charged that this provision of the statute was ignored are, (1) that the purchaser was not required to pay anything on account of the years in which, after the sale to the Commonwealth, the former owner himself paid the taxes assessed against him, and (2) that the purchaser did not pay the clerk, before obtaining his deed and within the time required by the statute, the city taxes for 1907, and the city and State taxes for 1908, both of which had accrued before his purchase and which he afterwards paid, not to the clerk, but to the city collector and the city treasurer, respectively, of the city of Roanoke.

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Held: That these objections were both good because they were based upon a disregard by the purchaser and the clerk of vital and indispensable requirements of section 666 of the Code of 1904.

Appeal from a decree of the Corporation Court of the city of Roanoke. Decree for complainants. Defendants appeal.

Affirmed.

The opinion states the case.

Hart & Hart and Jno. Dabney Smith, for the appellants.

G. A. Wingfield and Roy B. Smith, for the appellees.

KELLY, J., delivered the opinion of the court.

This suit was brought by Janie White Dey, widow and administratrix of W. W. Dey, deceased, and by her two infant children, suing by next friend, to annul a deed from S. S. Brooke, clerk of the Corporation Court for the city of Roanoke, to J. E. Zimmerman, the deed having been made to complete a tax sale to the latter of certain lots in Roanoke city which had been returned delinquent for nonpayment of taxes assessed in the name of W. W. Dey.

A demurrer to the bill was overruled, and thereupon, the cause having been submitted upon the bill and exhibits, the answer of the defendants, and an agreed statement of facts, the court entered the decree under review, setting aside and annulling the deed.

The lots were duly returned delinquent for the year 1894 in the name of the owner, W. W. Dey, and sold to the Commonwealth for the nonpayment of the city and State taxes for that year. The commissioner of the revenue failed to note the sale on the land book, as required by section 469

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of the Code, and the lots were thereafter assessed for taxes in the name of W. W. Dey for each succeeding year up to 1908, and were further returned delinquent in his name for nonpayment of city and State taxes for the years 1895, 1897, 1901, 1902, 1903 and 1904. He, however, paid the taxes that were thus irregularly assessed against him for the years 1896, 1898, 1899, 1900, 1905 and 1906.

On the first day of April, 1908, J. E. Zimmerman filed an application "to purchase under the provisions and requirements of section 666 of the Code of Virginia as amended March 5, 1900," the aforesaid lots, "sold on the 2nd day of December, 1895, in the name of W. W. Dey as delinquent for taxes due thereon for the year 1894, and purchased by the Commonwealth of Virginia." A copy of this application was served on Dey in person on April 2, 1908. When he filed this application Zimmerman paid the clerk \$5.71, being ten per cent. of the total amount of \$57.10 paid by him for the purpose of completing his purchase and entitling himself to the deed. This amount was arrived at by taking as a basis the taxes for the year 1894 and the subsequent years up to 1908 for which Dey himself had not paid the taxes. If the calculation had disregarded such payments as were made in the intervening years by Dey, the total amount would have been \$92.91, and the sum to be deposited by him with his application would have been \$9.29.

The chief ground of attack upon the deed is that the purchaser was not required to comply with section 666 of the Code by paying to the clerk "the amount for which the sale to the Commonwealth was made and the taxes and county levies to the city, town or county or district in which the land is situated, *together with such additional sums as would have accrued from taxes, levies and interest if such real estate had not been so purchased by the Commonwealth, &c.*" The particulars in which it is charged

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that this provision of the statute was ignored are, (1) that the purchaser was not required to pay anything on account of the years in which, after the sale to the Commonwealth, Dey himself paid the taxes assessed against him, and (2) that the purchaser did not pay the clerk, before obtaining his deed and within the time required by the statute, the city taxes for 1907, and the city and State taxes for 1908, both of which had accrued before his purchase and which he afterwards paid, not to the clerk, but to the city collector and the city treasurer, respectively, of the city of Roanoke.

These objections are both good because they are based upon a disregard by Zimmerman and the clerk of vital and indispensable requirements of section 666 of the Code. Taking the objections up in their inverse order, the appellants contend that the appellee cannot rely upon the failure of Zimmerman to make full and timely payment of the city taxes for 1907 and of the State and city taxes for 1908, because the bill alleges that Dey himself paid the taxes for 1907 and 1908. To sustain this contention would carry to an entirely unreasonable and illogical extent the wise and wholesome general rule that the judgments and decrees of the courts must be based upon the pleadings, and that litigants must not be allowed to allege one state of facts and recover upon another. The bill in this case, it is true, contains an allegation that "Zimmerman failed to pay any part of said taxes that would have accrued for the years 1898, 1899, 1900, 1901, 1905, 1906, 1907, 1908 * * * which said taxes had been paid by the said Dey," thus necessarily averring that Dey had paid the city and State taxes for 1908, and the city taxes for 1907, and it developed as a matter of fact that Dey had not paid these particular taxes. But the gravamen of this bill is that Zimmerman obtained a tax deed without complying with the statutory requirements in the matter of his payments

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to the clerk, and when facts were offered in evidence which tended to support the fundamental charges and general purpose and prayer of the bill, but which were at variance with specific averments therein, the proper way to take advantage of the variance would have been to object to the evidence. This would have given the complainant an opportunity to amend the pleadings and would have worked prejudice to neither party. Instead of doing this, however, the appellants entered into an agreed statement wherein the very facts here relied upon by the appellees and which the appellants ask us to ignore, were, without any sort of saving or exception, agreed to be "considered as proven in this case." We do not know of any rule of pleading or any reason or authority that will deny one litigant the benefit of a fact germane to the gist of his suit or action, even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the cause.

But coming now to the other particular in which it is claimed that the appellants did not comply with section 666, we shall find that even if Dey had paid the taxes for 1907 and 1908, or if he were estopped by his pleading from denying that he paid them, such payments by him, unless he had also paid enough to fully redeem the lots, would have been irregular and erroneous, and would not have entitled Zimmerman to any credit therefor; and that the clerk allowed him improper credits for the years between 1894 and 1908, in which it is admitted that Dey did pay the taxes.

When a sale is made to the Commonwealth for delinquent taxes, as in this case, the title thereafter remains in the Commonwealth until it is divested by a redemption or a purchase in the manner prescribed by law. Until one of these events takes place, there can be, properly speaking,

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no further assessment of the property against the former owner for taxation, for the plain reason that the property belongs to the State. (See *Dooley v. Christian*, 96 Va. 534, 537, 32 S. E. 54; *Parsons v. Newman*, 99 Va. 298, 303, 38 S. E. 186; Minor's Law of Tax Titles, 84.) The land thus sold is thereafter to be carried on the land books, as required by section 469 of the Code, in the name of the former owner, but with a notation of the sale to indicate its status. When a former owner redeems, or a third person purchases, he will be required to pay to the clerk, along with certain fees and penalties, such sums as would have accrued for taxes if no sale to the Commonwealth had been made. If the commissioner of the revenue, after a sale to the Commonwealth, neglects his duty and fails to note the sale, and the land is, for subsequent years, by apparently regular proceedings, assessed against the former owner and the taxes paid by him, it would certainly be just, whether strictly according to law or not, for him to be given the credit for such irregular payments, in case he should thereafter undertake to redeem the land from the Commonwealth. But there is no just reason why a stranger, like Zimmerman in this case, should be permitted to come in and appropriate the benefit of such credits; and the statute is so written, whether advisedly and for that purpose or not, as to prevent him from so doing. Zimmerman's right in this case, and his only right under the statute, was to purchase the lands for the amount of the taxes for which the sale was made to the Commonwealth, and such other amounts as would have become due for taxes if the sale had not been made. Whether, if Zimmerman had paid the taxes for all the intervening years after 1894, as in effect proposed by him in his application and as required by the statute, so that the State would thus have collected double the amount of the taxes for some of the years, there would have been any relief for Dey as to the sums erroneously

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paid by him, is not here a material question. He probably would have the same remedy open to him that is open to any other person who has paid taxes erroneously assessed against him. But, in any event, it is certain that the statute was never intended to confer any such favors or benefits on purchasers of tax titles as is claimed by the appellants in this case.

It is urged on behalf of the appellants, that the statute itself sustains their position because, when Zimmerman came to make final settlement with the clerk, he had the right to purchase the property "by paying to the clerk *all remaining taxes*, levies, interest, penalties, fees and costs, and by paying all city, town and county taxes and levies *remaining unpaid*, together with all interest and penalties" as provided for by the express terms of section 666. The language just quoted does appear in the statute, but considering the section as a whole we think this language has the same meaning as that contained in the preceding part of the section, fixing the amount to be paid as "the amount for which the sale to the Commonwealth was made and the taxes and county levies due the city, town or county, or district in which said land is situated, together with such additional sum as would have accrued from taxes, levies and interest if such real estate had not been so purchased by the Commonwealth, with interest," etc.

It is further contended, however, and this raises the most important question in the case, that the failure of the clerk to demand, and of the purchaser to pay, the sums required by section 666, if there was such failure, is cured, and the deed rendered valid, by the terms of section 661 of the Code.

In *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813, there was a question as to whether the notice to the personal representative of the former owner, as then required by section

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666, had been properly served, and this court held that the service was probably good, but that the question of defective service was immaterial because the purchaser had already obtained his deed which was "subject to be defeated only by proof that the taxes or levies for which the real estate was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable on such real estate have been paid;" and the opinion then added: "It follows from what has been said that no valid objection has been shown to the deed, or to the proceedings which led up to it." Judge Buchanan dissented, but the report of the case does not indicate the ground of his dissent. No subsequent case in Virginia has followed *Thomas v. Jones* in its full effect.

In *Virginia Coal Co. v. Thomas*, 97 Va. 527, 34 S. E. 486, the sale to the Commonwealth was attacked on the ground that the treasurer did not make it on the day for which it was advertised, and did not legally adjourn it to the day on which it was finally made. The report of the treasurer showed a regular adjournment, the alleged illegal adjournment was denied in the answer, the evidence was conflicting and inconclusive, and this court held that in this state of the case the decision of the lower court upon this question of fact, in favor of the validity of the proceedings under which the sale was made, must be upheld. The opinion then proceeded to show that section 661 added further strength to the position of the purchaser, who had already obtained his deed. It is to be observed, however, that while *Thomas v. Jones*, *supra*, is cited with apparent approval in *Va. Coal Co. v. Thomas*, there was not in the latter case a failure in any respect to comply with the provisions of section 666, Judge Keith delivering the opinion and using this significant language: "So that Thomas having complied with all the requirements of section 666 comes within the protection of section 661."

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In *Va. B. & L. Co. v. Glenn*, 99 Va. 460, 467, 136, 139, Judge Cardwell, delivering the unanimous opinion of the court, said: "In *Thomas v. Jones*, *supra*, to set aside the deed was filed by the holder of a lien, the previous owner of the property not being to the suit, and as the statute was when the deed case was made it was not required that notice of the application to purchase land should be served on a person whose debt was secured thereon, and there was no mention in the bill of entire lack of notice, but of a defect in notice of the application. The deed in that case was to be valid and within the protection of section 661 on the ground that no valid objection had been shown to the deed, or to the proceedings which led up to its execution.

This case of *Va. B. & L. Co. v. Glenn*, in its effect, qualified, if it did not entirely overrule, *Thomas v. Jones*, in the extent to which the latter case carried the effect of section 661 of the Code.

The learned judge of the corporation court filed an opinion cause a written opinion, from which we quote the following extract, omitting his reference to *Thomas v. Jones* and *Va. Coal Co. v. Thomas*, *supra*, which have since been sufficiently adverted to:

"Counsel for defendants contend that section 661 of the Code takes away from the plaintiffs the right to raise an objection, and validates the deed, notwithstanding the failure on the applicant's part to pay the correct amount of the consideration. This is the single question for decision. I have examined the decisions of our Court of Appeals and so far as I can find, this exact question has not been directly passed upon. I think, however, the principle involved has been settled by the decisions. Section 661 of that portion applicable to this case, reads as follows:

"When the purchaser of any real estate sold in

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ance of section 666, has obtained a deed therefor, and the same has been duly admitted to record in the county or corporation in which such real estate lies, the right or title to such estate shall stand vested in the grantee, etc., subject to be defeated only by proof (one) that the taxes or levies for which said real estate was sold were not properly chargeable thereon; or (two) that the taxes and levies properly chargeable on such real estate have been paid; or (three) that the notice of the application to purchase has not been duly given; or (fourth) that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser.'

"Upon reading the earlier decisions of our Court of Appeals in tax title cases, one clearly sees that it has been a uniform policy to require a strict compliance with the statute in order to divest a land-owner of his rights in his land. This is because such statutes are penal in their nature and entail forfeitures. *Wilson v. Bell*, 7 Leigh (34 Va.) 22; *Boon v. Simmons*, 88 Va. 258, 259 [18 S. E. 439]; *Bond v. Pettit*, 89 Va. 474 [16 S. E. 666].

"A careful study of the more recent decisions, I also think, shows that our courts do not mean to depart from this policy, and that a proper construction of section 661 does not involve a departure from this well settled policy. As the decisions clearly show, in order to invoke and be entitled to the benefit of section 661, he who has acquired a tax title, such as the one here involved, must have acquired it in accordance with the requirements of section 666; that section 661 was not intended to make a tax title good unless it has been acquired as the statute says, 'in pursuance of section 666.'

* * * * *

"In the case of *Thomas v. Jones*, 98 Va. 323, 331 [36 S. E. 382, 385], the deed was invalidated and Keith, Presi-

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dent, in his opinion on page 331 uses this language: 'Appellant cannot be permitted to rely upon the deed executed to him by the clerk to cure any defects which may exist in the course of the proceedings under which he claims.'

"In the case of *Virginia Building and Loan Company v. Glenn*, 99 Va. 460 [39 S. E. 136], the deed was held invalid, and in the opinion Cardwell, Judge, says: 'In no view of this statute, providing how title to land held by the Commonwealth for delinquent taxes may be acquired by a purchaser, does it appear that the legislature intended that the purchaser should be protected by the provisions of section 661, if he had not acquired his deed by compliance with the provisions of section 666.' Again, the opinion reads: 'Before the purchaser under section 666 can claim the benefit of the terms of section 661, he must show that he has fulfilled the provisions of section 666, and until he is in a position to do this, there is no authority for making him a deed to the property.'

"In the case of *Bowe v. City of Richmond*, 109 Va. 254 [64 S. E. 51], Buchanan, Judge, in delivering the opinion, says: 'In order to claim the benefit of the provisions of section 661, as was held in *Virginia Building and Loan Company v. Glenn*, 99 Va. 460 [39 S. E. 136], a purchaser under section 666 of the Code must comply with all the provisions of the latter section.' I think this case comes very near passing on the identical question involved in the instant case, viz: that the applicant's right to purchase is dependent upon his paying to the clerk all taxes, levies, penalties, and so forth, both city and State, and at the time fixed by the statute.

"The case of *Wright v. Carson*, 110 Va. 498 [66 S. E. 37], relied on by counsel for the defendant, I do not think changes the effect of the decisions above quoted. In this case the deed was upheld, but only two questions were decided: (1) that the recitals in a deed from the clerk to

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the purchaser under section 666 are at least *prima facie* evidence, and (2) that the application to purchase was properly filed in the clerk's office of the Corporation Court of Roanoke where the land lay at the time application was filed, although it was taken into the city by extension of its corporate limits since the sale to the Commonwealth.

"The case of *Crawford v. Floyd*, 112 Va. 699 [72 S. E. 711], the only other case relied on by counsel for the defendant, I likewise do not think is in conflict with the above decisions. The only attack made upon the deed in this case, which contained proper recitals, was upon the ground that the ten per cent. of the purchase price, required to be deposited with the clerk at the time of application, was not so deposited. The court held that the recitals in the deed were *prima facie* evidence, and they were not overcome by sufficient evidence to the contrary. Even in this case, I think the opinion of Cardwell, Judge, clearly shows that the court was of opinion that the legislature did not intend by section 661 to make the recitals in the deed from the clerk conclusive evidence of compliance with the essential requisites of section 666.

"In the case of *Coles' Heirs v. Jamerson*, 112 Va. 311 [71 S. E. 618, 50 L. R. A. (N. S.) 407], the deed was held invalid because it failed to recite that the land was sold by the treasurer for the non-payment of taxes and the sale was reported to the court and confirmed; that they were circumstances appearing in the clerk's office in relation to the sale,' and their omission from the deed was fatal to it. The only bearing this case has on the instant case is to show that our court has in no sense departed from its original policy of requiring a strict compliance with the requisites of the statute, in order to divest a land owner of his rights in his land, for the same purpose I refer to the case of *Roller v. Armentrout*, 118 Va. 173 [86 S. E. 906].

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"The case of *Gordon v. Joyner*, 112 Va. 347 [652], holds that the authority of the clerk to make to the purchaser is a mere naked power, not coupled with an interest, and hence every requisite to its exercise must be strictly complied with, and that a failure to comply with the essential requisites of the statute are not a bar to the section 661 of the Code."

We concur in the views expressed and conclusions reached in the foregoing extract from Judge King's opinion. When considered primarily, the question is not entirely free from doubt, and there are expressions in some of the opinions of this court with reference to the meaning and effect of section 661 which lend color to the contention of the appellants. We believe, however, that the decree of the court of is in accord with a correct construction of sections 661 and 666 of the Code, and with a proper interpretation of the decisions of this court which have dealt with the matter acquired under those sections.

The decree is affirmed.

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Syllabus.

Richmond**ALEXANDER V. CRITCHER.**

November 15, 1917.

1. **CONTRACTS—Construction—Surrounding Circumstances.**—In order to arrive at a correct construction of a contract, it is proper to consider the situation of the parties and the circumstances and negotiations which led to its execution.
2. **BROKERS—Contract for Sale of Real Estate—Share in Profits.**—Complainant purchased a large tract of mountain land at a judicial sale, and subsequently sold it to one G. for a price which netted him a substantial profit. Defendant held a lien upon this land and it was under a decree in a suit brought to enforce this lien that complainant bought the land upon the instigation of defendant, and complainant entered into a contract with defendant whereby he agreed to give to defendant a one-third interest in the profits upon a sale, made by the complainant, with the assistance of the defendant, of said lands, after all the costs and expenses had been paid, in consideration that the defendant should use his best efforts to make a sale of the property, show the property to prospective buyers, use his best efforts to keep fire off the property, and keep parties from robbing the same, and exercise in fact, a general supervision of the property, under the direction of the complainant. The course of dealings between complainant and defendant, as evidenced by their correspondence and otherwise, indicated that defendant was regarded, not merely as an agent, but an interested party. He continued to look after the physical protection of the property, was active and diligent in his efforts to make a sale, and responded promptly and helpfully when he was called upon in the preliminary negotiations which resulted finally in the sale to G.
Held: That there was no error in the decree which awarded defendant one-third of the net profits arising from the sale to G., notwithstanding that the sale to G. was not made by defendant.
3. **BROKERS—Contract for Sale of Real Estate—Share in Profits.**—Under the circumstances set out in the preceding headnote the fact that defendant notified the purchaser, G., that he was

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entitled to one-third of the money to be paid by him land, and warning him not to pay over this amount defendant's consent, was not such an interference with t as would bar his right to one-third of the purchase defendant having reason to suppose that complainant not keep the contract on his part; his duty did not requ to stand silently by and submit to a repudiation of t tract by complainant.

4. **APPEAL AND ERROR—Conclusiveness of Commissioner's Report on Conflicting Evidence.**—A commissioner's report, made on conflicting evidence and approved by the trial court, v be disturbed on appeal unless the error complained of pable.
5. **JUDGMENTS AND DECREES—Appeal and Error—Presumption in Favor of Decree on Conflicting Evidence.**—There is a p tion in favor of the decree of a trial court, and this p tion is entitled to especial consideration when the de based on uncertain and conflicting testimony.
6. **HOMESTEAD EXEMPTION—Fiduciary Debt—Appeal and Error—Harmless Error.**—Where complainant under the circum set out in the second headnote agreed that defendant have one-third of the profits of the resale of land pu at a judicial sale, although there arose from the transa fiduciary relationship and not a mere contract of emp between complainant and defendant, complainant was n a fiduciary as is contemplated by the statute, Code c section 3630, clause 3, which provides that the hom exemption shall not extend to any execution or proce demand "for liabilities incurred by any public officer, cer of a court, or any fiduciary, or any attorney at money received." A recital in the decree, therefore, complainant, "homestead exemption waived by reason fact that this is a fiduciary debt due" from complainant defendant is improper, and the decree should be corre this respect; but the error is probably harmless, si record not only indicates that complainant is abu solvent, but also that the recovery complained of secured by an ample supersedeas bond, so that ther reasonable probability that his homestead will ever be s to satisfy the decree.

Appeal from a decree of the Circuit Court of Rock county. Decree for defendant. Complainant appea

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The opinion states the case.

Hugh A. White, Timberlake & Nelson, J. A. Alexander and L. Travis White, for the appellant.

John Critcher, William A. Anderson and G. D. Letcher, for the appellee.

KELLY, J., delivered the opinion of the court.

On the 21st of March, 1910, J. A. Alexander purchased a large tract of mountain land at a judicial sale, and subsequently sold it to G. F. Gray for a price which netted him a substantial profit. John Critcher claimed to be entitled to one-third of this profit. Alexander refused to recognize the claim. The circuit court, in the litigation which ensued, sustained Critcher, and Alexander brings this appeal.

The decision of the controversy hinges upon the construction of a written contract, dated April 18, 1910, between Alexander and Critcher, which, after reciting the original purchases by Alexander, sets forth the agreement between the parties as follows:

"And whereas the said party of the first part (Alexander) resides in Staunton, Virginia, a considerable distance from said land, and in order to keep parties from robbing the tract of timber and to keep off the fire and to effect a sale, the said party of the first part hereby agrees to give to the party of the second part a one-third (1-3) interest in the profits upon a sale, made by the party of the first part, with the assistance of the party of the second part, of said lands, after all the costs of purchase and expense of caring for said land, and expense of sale, taxes and every other expense has been paid, in consideration that the said party of the second part, shall use his best efforts to make a sale of the property, show the property to pros-

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pective buyers, use his best efforts to keep fire property, and keep parties from robbing the same, a general supervision of the property, under the direction of the party of the first part."

There are no controverted questions of practice involved, but it will conduce to a clearer understanding of the difference between the parties to briefly outline the proceedings.

The litigation was begun by a bill in equity filed by Alexander after he had made the contract of sale with Gray, but before that contract had been fully carried into execution. This bill charged that Critcher had violated his contract obligations in all essential respects; that Alexander had therefore employed one Joseph A. Walker in his behalf, that Critcher had not had anything to do with the purchase, since Walker's employment, had not aided in making the sale to Gray, and was placing a cloud upon the title by interfering with the consummation of that sale by not allowing Gray that he owned one-third of the land and not being accounted with accordingly. The bill prayed that Critcher be enjoined from interfering with the sale, and that the contract between him and Alexander be cancelled and annulled.

In reply Critcher filed an answer and cross-bill, setting out the history of his connection with the land and the sale thereof to Alexander, and the circumstances leading up to the contract quoted above. He denied the allegations in the bill, claimed one-third of the net proceeds of the sale to Gray, and prayed for an account and decree for his share of the profits and for costs.

A number of depositions were taken on both sides, and which were filed many exhibits, consisting mainly of correspondence between Critcher and Alexander and between Critcher and certain other parties, and the cause was set on to be heard on the merits, the circuit court en-

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decree on November 8, 1913, awarding Critcher one-third of the net profits on the sale, and referring the cause to Commissioner W. T. Shields to ascertain the amount. The commissioner reported "that the one-third of the net profits to which the said John Critcher is entitled amounts to the sum of \$2,491.35, with interest from December 12, 1912, subject to all proper costs chargeable thereon." To this report there were a number of exceptions by Alexander, and the court, on its own motion and in aid of its judgment, referred the cause, upon this report of Commissioner Shields and the exceptions thereto, to Commissioner Fitzhugh Elder, who filed a report which resulted in reducing the amount formerly found for Critcher to the sum of \$1,804.05. This report was excepted to by Alexander and by Critcher, but all the exceptions were overruled, and the Shields report, as modified by the Elder report, was confirmed, and a decree was entered on May 1, 1916, in favor of Critcher for \$1,804.05, with interest from December 12, 1912, and costs.

The fundamental question in the case turns, as we have seen, upon the meaning and effect of the written contract between Alexander and Critcher; and in order to arrive at a correct construction of this instrument, it is proper to consider the situation of the parties and the circumstances and negotiations which led to its execution. *Walker 1. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826, 829, and authorities there cited.

Critcher was a lawyer and a real estate speculator. He was familiar with the land and its title. The exterior lines embraced some twenty-one individual tracts, the title and boundaries of which were more or less involved and unsettled. For some time Critcher had looked upon the property as offering a good opportunity for legitimate investment and speculation, but had realized that if the opportunity was availed of, it would require an original cash

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outlay in the purchase, and a subsequent expenditure of further capital and much personal care and attention in connection with clearing up the title, definitely establishing the boundary lines, and, in the meantime protecting the timber thereon against the two common enemies of such property, trespassers and mountain fires. He did not have the money to finance the project, and his plan was to find one or more associates who would furnish the money, utilize his information and assistance, and allow him to share in the profits which he was satisfied could be realized as soon as the title and boundaries were settled and the property in condition to attract purchasers. As attorney for one S. A. Moore, he held a lien upon this land, and, together with Mr. Curry, of the Staunton bar, he brought a suit to enforce this lien. The decree under which Alexander bought was rendered in that suit. In the outset, Mr. Moore, Mr. Curry and Mr. Critcher had under serious consideration the joint purchase of the property, in furtherance of the plan which Critcher had in view, but these other gentlemen finally abandoned the scheme. Mr. Curry, however, who was a friend of Critcher and was anxious to help him carry out the undertaking, which Mr. Curry evidently considered a legitimate and worthy attempt to develop the property as an investment, called Mr. Alexander's attention to the proposition, and thus the negotiations with Alexander began.

There is little room for doubt, under the evidence, that Alexander fully understood that Critcher expected and believed that he was to have a share in the profits of a resale which both he and his former associates, and later he and Alexander, had in contemplation. The land was bought as a speculation, and upon the representation of Critcher that it could be made to yield a profit; and this was plainly understood between him and Alexander as the reason for Critcher's interest and activity in finding a purchaser at

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the judicial sale who would recognize his interest in the transaction. In his deposition, Alexander says: "Mr. Curry came to me, stating that Mr. John Critcher and himself had instituted court proceedings in Bath county, in which this tract of land was to be sold; that it would be sold on the 21st, that he wished to interest me in it because of Mr. Critcher, as I understood; and it further seemed to me that he wanted to find a purchaser as well. I had never heard of the land or of the sale of it prior to that date. Mr. Curry had quite a talk with me about the land, telling me what Mr. Critcher thought of it and what Mr. Critcher could do with it." Again he says: "After discussing the matter a good deal with Mr. Curry about what I might make out of it, or prospectively make out of it, and that Mr. Critcher would handle the property for me and that he thought he could get a good price, as I stated above, and he told me that Mr. Critcher wants to share in the profits with me, and I told him if Mr. Critcher could make that sort of a sale and take care of the property, that I would be willing to go into the matter and invest in it." After this conversation between Alexander and Curry, Critcher called on Alexander who describes their interview in part as follows: "Mr. Critcher told me that he had had the property for sale for quite a long time for Mr. Austin, but that there was \$10,000 or more taxes on the land, and it was hard to do anything with it; that he felt sure if the taxes were removed and the title cleared up, that he could sell this property for \$2 or \$2.50 an acre, or something like that. * * * He discussed the possibilities of the property, and what it might bring, in his judgment, if it could be sold; that he wanted to get something out of the property; that he had been trying to sell the property for a long time; we, after a good deal of conversation, had a tentative understanding that I would go and look at the property and that if I thought it would be advisable to buy, that he

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would take charge of the property and keep people off it, look after it and keep fire off, and make sale of the property along the lines indicated by him, that I would give him one-third of all the net profits, in the event, however, that I considered it worth while trying to buy." It was observed that in these statements, Alexander coupled with his admission that Critcher was the moving spirit and was expected to share in the profits, a condition that Critcher was to sell the property for him. The written contract, however, did not so provide, as will be presently more fully pointed out.

Critcher took Alexander over the property, and, within two or two later, it was sold at public auction and Alexander became the purchaser. In making the first payment, Alexander was assisted by a loan from Mr. Curry, who, as was seen, had first been brought into the matter by Critcher, who was endeavoring to aid the latter in every way he could.

Immediately after the purchase by Alexander, and pursuant to the understanding between the parties, Critcher assumed general charge and supervision of the property, endeavoring to guard it against trespassers and to protect it against forest fires, and using his best efforts to make a sale. The written contract, as its date indicates, was made until nearly a month later. It was prepared by Alexander, or under his direction. Critcher claims that, on account of some difficulty in getting the written contract and that the one was not as favorable to him as the previous understanding entitled him to have it. Alexander says in this position, "It was distinctly understood before the purchase that if I bought it I would let Mr. Critcher have the land." It may be that Critcher wanted the contract to say as much and to give him the exclusive power or some controlling voice as to price and terms. However, this may be, the contract expressly contemplates '

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by the party of the first part with the assistance of the party of the second part." Under familiar rules of construction, the language of the contract must be taken most strongly against Alexander, and so construed as to give Critcher all that the words used are capable of passing to him. There is no stipulation that Critcher shall make the sale as a condition entitling him to a share in the profits. Bearing in mind the previous negotiations between the parties, and their situation at the time with reference to this property, the contract was appropriately expressed to carry out the common plan to which both parties had been working—a sale of the property for a profit, its protection in the meantime against damage from trespass and fire, and an ultimate division of the profit.

The subsequent conduct of the parties placed a practical construction upon this contract which fully sustains Critcher's contention in this case. From the date of Alexander's purchase to that of his sale to Gray, the course of dealing between him and Critcher, as evidenced by their correspondence and otherwise, indicates that Critcher was regarded, not merely as an agent, but as an interested party. He continued to look after the physical protection of the property, was active and diligent in his efforts to make a sale, and responded promptly and helpfully when he was called upon in the preliminary negotiations which resulted finally in the sale to Gray. The employment of Walker, was not, as charged in the bill, due to any complaint then made of Critcher's supervision, and not to supersede, but to aid him. Walker was recommended to Alexander by Critcher as a surveyor, and although Alexander claims in his deposition that he understood Critcher was tired of the work and that, for this reason and because of Critcher's neglect, Walker was afterwards put in full charge, this statement is met by his own subsequent letter to Critcher, in which he said: "I am glad to get the

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full account. I feel very much like taking strenuous action against those people. I employed Mr. Walker to look after this tract because I knew that he knew the land. I thought I had told you this, but I guess I had forgotten it when I saw you. * * * Now as Walker and you know the ground you know best what to do. Stop those trespassers. Use my name in any attachment or other proceeding.

A careful reading of the voluminous evidence upon this subject satisfies us that Critcher in good faith kept his contract. He performed his contract and did all that the parties contemplated he should do to entitle him to one-third of the profits. It is manifest that his familiarity with the land was put to practical use by Alexander in directing the surveying and title work, and that there was the harmony and co-operation between these two parties which would be expected of persons working to a common end and a common interest until after the contract had been broken with Gray. The services, advice and assistance of Critcher had been so fully accepted and availed of by Alexander that it would have been difficult if not impossible to deny him his claim to share in the profits, even if the sale to Gray had been a transaction wholly independent of any knowledge or participation on the part of Critcher; but, as a matter of fact, he was called upon and responded promptly and satisfactorily in the preliminary negotiations, and beyond any question, resulted in that sale. These negotiations were begun through J. F. Tannehill, Jr., with whom Alexander had listed the property. Upon receiving an inquiry from Parkinson and Thrawl, of Ohio, for the property, Tannehill mentioned the inquiry to Alexander and was referred to Critcher as the party who would sell him the property or see that it was shown to him. Tannehill testifies that at this time Alexander told him that Critcher was interested in the property and stated the fact that he and Critcher were partners in it. Alexander

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denies this, but, as the learned judge of the circuit court says in his written opinion, "Tannehill has no interest in this litigation; he is a witness of character and intelligence;" and we may add that his testimony is strongly corroborated by the probabilities to be drawn from the relationship between the parties and their previous dealings with each other. Tannehill took Parkinson and Thrawl to see Critcher who spent the greater part of a day showing them over the property, and then introduced them to Walker, the surveyor who had been associated with him in looking after the property and who, by reason of the surveying he had done, was more familiar with the boundary lines. Later on, Parkinson visited the property again, bringing with him a timber expert named Gatz. Some question arose about an adverse claim to part of the property. Tannehill says: "Mr. Parkinson and Mr. Gatz seemed to doubt the advisability of buying the property, and Mr. Critcher explained to them the prior rights of Mr. Alexander to this land and seemed to satisfy them on that point, certainly better than I could have done." He further says that Critcher assisted him in the efforts to sell the property "in a very satisfactory way," and that he corresponded with Critcher considerably and "talked to him a great deal more about the sale than to Alexander." On the third visit to the property Parkinson was accompanied by Thrawl and Gray, and on this occasion also Critcher was active in his efforts to promote the sale.

We do not overlook the contention that Gray was not Tannehill's purchaser, and that Walker in fact made the sale and was paid for doing so, but Tannehill claimed and was paid a commission, and the evidence puts beyond the pale of controversy the fact that Critcher was active and materially helpful in his efforts to aid in making the sale, thus complying with his contract in this respect to the letter.

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But it is contended, on behalf of Alexander, that if Critcher would otherwise have had a right to share in the profits, he forfeited it by endeavoring to interfere with and defeat the sale to Gray. We do not think this proposition can be maintained. After Critcher had helpfully and in good faith aided the negotiations which culminated in the sale, he was informed by Alexander that Gray had bought the land. This was in August, 1912. On October 15, 1912, Critcher wrote Alexander a letter, which so far as here material, was as follows: "It seems to me reasonable that I should have a statement of the receipts and expenditures in the matter of the Panther land, together with, substantially, the amount coming to me at the closing up of the sale to Gray, etc. What I would like is, how much it sold for, what expenses have attached, what sums to be paid others in connection with the sale, and to whom." Alexander replied on October 19th as follows: "I have been out of the city. Your letter and card received. I am too busy trying to get the deal with Mr. Gray closed to stop and take up the matter mentioned in your letter. I am not sure that the deal will be closed and if it is not there will be no need of taking up the other matter until it is closed. Then you come here and we will take up the other matter. I will not know whether the deal is closed or not until the 28th of November, 1912." This letter upon its face and standing alone does appear unreasonable or suspicious, but nearly two months had elapsed since the contract had been made with Gray, there are indications in the record tending to show that Alexander had not been dealing frankly with Critcher with reference to the matter, Critcher's suspicions as a matter of fact had been aroused, and, not being satisfied with Alexander's plea that he was too busy to attend to Critcher's request, the latter then wrote Gray as follows:

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"I herewith notify you that I am entitled to one-third of the money to be paid by you (subject to all proper charges), for the 11,360 acres of land contracted for by you with J. A. Alexander, of Staunton, Va. I notify you of this, that you may not pay over this amt., one-third, of the agreed price, without my consent, this being notice of my equity in said sum and in the property. I concur in the sale, and do not wish to delay it. The purpose of this notice being simply to notify you, that I wish this proportion of the purchase price held by you until the amount is ascertained to which I am entitled. I am sure it is needless to add that your failure to observe the rights claimed by me would subject you to liability." If Critcher's suspicions were warranted this was a proper letter; and that they were warranted is conclusively shown by the bill which Alexander subsequently filed in this cause and in which he distinctly, and without qualification, takes the position that Critcher would under no circumstances have had any claim to share in the profits of this sale, and that he had actually severed all association with him, and substituted Walker in his stead, more than a year before that sale was made. The allegations of his bill cut off all escape from the conclusion that Alexander, when he made the contract with Gray and when he wrote the letter of October 19, 1912, intended to deny any claim on Critcher's part, and it is equally clear from the evidence that he was concealing this purpose from Critcher. His letter, therefore, while reasonable and innocent upon its face, appears in the light of subsequent developments to have been, just as Critcher believed, evasive and insincere.

The letter to Gray distinctly asserted Critcher's concurrence in the sale, and cannot be construed as an effort to interfere with its consummation. It was written, however, before the transaction was complete, and it caused some uneasiness and dissatisfaction on Gray's part. Subse-

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quently, as Critcher naturally became more angry and aggressive because of Alexander's continued failure to acknowledge his claim and render him a statement, he made statements and wrote letters to persons more or less intimately connected with the transaction (none, however, directly to Gray) which were threatening and abusive in tone, and tended to endanger the final consummation of the sale. It must be remembered, however, that all this occurred after Alexander had resolved to violate his contract obligations with Critcher, and, moreover, that there was never a moment when Alexander could not have promptly removed all dissatisfaction and embarrassment with both parties, Gray as well as Critcher, by simply recognizing Critcher's interest and dealing with him in accordance with his contract rights. Critcher was loath to release his contract obligations so long as he had any reason to suppose that Alexander would keep the contract on his part; and his duty did not require him to stand silent and submit to a repudiation of the contract by Alexander whereby he would necessarily have been deprived of his own rights. Fairly construed, we think all that Critcher did towards interfering with the sale to Gray amounted to no more than an assertion of his rights and an effort to protect them. It was not all done in good temper and good taste, but Alexander's attitude and allegations in this regard show conclusively that he made up his mind to repudiate Critcher's claim; and the only excuse he now offers for concealing this purpose from Critcher for so long a time is that he had been advised to keep on friendly terms with Critcher because he was a vindictive man and would be likely to interfere with the sale of the property if enmity was incurred.

There was, in our opinion, no error in the decree of November 8, 1916, which awarded Critcher one-third of

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net profits arising from the sale to Gray; and this disposes of the first and principal assignment of error.

The remaining assignments flow from the decree of May 1, 1916, confirming the report of Commissioner Shields as modified by that of Commissioner Elder. In so far as these remaining assignments are based upon the exceptions to the reports of the Commissioners, they depend almost exclusively upon controverted questions of fact. Some of them are not free from doubt. Upon the whole we are of opinion that the commissioner's report in its final form has gone as far in Alexander's favor as the evidence would at all justify; and the case in this respect is clearly within the influence of the rule that a commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable. *Cottrell v. Mathews*, 120 Va. 847, 92 S. E. 808.

Upon much the same consideration we are constrained to overrule the assignment charging error in the date from which interest is allowed in Critcher's favor by the report and decree. The account was a difficult one to make up with accuracy and exactness, owing not only to the conflict of testimony but also, and in considerable degree, to Alexander's imperfect and inadequate record of his expenditures. The reports of the commissioners bear upon their face unmistakable evidence of a diligent and faithful effort to reach the right of the matter. There is a presumption in favor of the decrees of trial courts, and this presumption is entitled to especial consideration when the decree is based on uncertain and conflicting testimony. *Witt v. Creasey*, 117 Va. 872, 877, 86 S. E. 128. This presumption in the instant case is re-inforced by the carefully considered report of two commissioners. This conclusion renders it unnecessary to decide whether this ground of error, which was not raised below by exception or other-

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wise, so far as the record shows, could be raised first time here.

The decree of May 1, 1916, awarding judgment Alexander recited as to the recovery, "homestead exemption waived by reason of the fact that this is a first mortgage debt due from J. A. Alexander to John Critcher," and this is assigned as error. If the demand upon which the decree was based was one against which the homestead exemption could not be claimed, then the recital in question, though singular in phraseology, was proper in substance. Code of Virginia, section 3649-a. But, while we think there was a fiduciary relationship and not a mere contract of employment between Alexander and Critcher, we do not think Alexander was such a fiduciary as is contemplated by the Code, section 3630, clause third, which provides that the homestead exemption shall not extend to any execution process on a demand "for liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money received." *Chapman v. Felt*, 2 How. (U. S.) 202, 11 Law Ed. 236, 6 Va. Law Rep. 283; *Cromer v. Cromer*, 29 Gratt. (70 Va.) 283. It was proper, therefore, to embody this recital, and the error will be corrected in this respect; but the error is practically harmless, since the record not only indicates that Alexander is absolutely abundantly solvent, but also that the record complained of is now secured by an ample supersedeas bond, so that there is no reasonable probability that the homestead will ever be attacked to satisfy the decree.

It was insisted in the closing argument for the appellant at the hearing in this court that Critcher could have no standing in equity, because, as argued, the record shows (1) that he had made a champertous contract with client Moore, and (2) that he did not deal honestly with Moore after bringing the suit. This contention was not raised in any way in the lower court, nor in the briefs.

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before us. Without further prolonging this discussion, we deem it sufficient to say that in our opinion, based upon a careful study of the record, the contention, even if material in this suit, is not sustained.

The other errors complained of have been duly considered. They are of minor importance and we need only to add that we find nothing in them to warrant a reversal of the decree. It will therefore be amended in the one particular already pointed out, and as thus amended will be affirmed.

Affirmed.

Syllabus.

Richmond

BABER AND OTHERS V. BABER AND OTHERS.

November 15, 1917.

1. **BEST AND SECONDARY EVIDENCE—*Lost Instruments.***—A copy of an original contract, which has been lost, made by counsel and filed with the bill of one of the parties to the contract, which bill alleged that the original had been filed with the answer of the party in another suit, although not authenticated by the certificate of the clerk of the court among the records of which the original was filed at the time such copy was made, is admissible in evidence. The fact that at the time such copy was filed it was not the best evidence and valid objection might have been made in that suit to its introduction in evidence, is immaterial, after the original has been lost, and section 3334, Code of 1904, has no application.
2. **LOST INSTRUMENTS—*Parol Evidence—Contents.***—Where the proof of the former existence of an instrument is strong and conclusive, even parol evidence of its contents is admissible, and if strong and convincing, will set up and establish the lost instrument.
3. **ADVERSE POSSESSION—*What Constitutes Color of Title.***—Color of title must be by deed or will, or other *writing*, which purports or contracts to pass title, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom by the application thereto of the general rules governing the location of land conveyed by a deed. The title to which the writing gives the color, or semblance of title, may be an equitable as well as a legal title. It is inherent in color of title that the title claimed thereunder is invalid—is in fact no title—and the writing may indeed be absolutely void: but if the other requisites of the statute of limitation are complied with by the disseisor, it will constitute color of title.
4. **ADVERSE POSSESSION—*Color of Title—Case at Bar.***—An instrument executed by a father and son, called a bill of bargain and sale, set forth that the father sold to the son a certain parcel of land, describing it, in consideration of one-half of

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the merchantable fruit on the premises, during the lifetime of the father, and that the son should furnish his mother with board and lodging during her life.

Held: That this constituted a contract in writing, which, if performed on the part of the vendee, would have passed the equitable title to the land to him; and if his possession of the land was accompanied by the *bona fide* claim that he had performed his part of such contract and that he was entitled to the land thereunder, the contract gave him color of title. It is not necessary to consider the question whether the son in fact performed the contract on his part so as to have acquired a valid title to the land. The inquiry stops with the ascertainment of the fact that he accompanied his possession with the *bona fide* claim to have so done, and continued such possession unbroken for the statutory period.

5. ADVERSE POSSESSION—*Joint Tenants and Tenants in Common—Parceners.*—The possession of one joint tenant, tenant in common or parcener, is *prima facie* the possession of his fellow, and it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster or disseisin or other act amounting to a total denial of the cotenant's right as cotenant.
6. ADVERSE POSSESSION—*Possession Held Under True Owner—Disclaimer.*—Where possession is originally taken or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and assertion of an adverse right, brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be open, continuous and notorious, so as to preclude any doubt of the character of the holding or the fact of knowledge on the part of the owner.
7. ADVERSE POSSESSION—*Possession Held Under True Owner—Disclaimer—Constructive Notice.*—The notice to or knowledge of the true owner or of the coparceners, or others originally having privity of title with the disseisor, of his disclaimer and assertion of an adverse right, required to be proved before the running of the statute of limitations will begin, need not be actual; it may be constructive.
8. ADVERSE POSSESSION—*Possession Held Under True Owner—Disclaimer—Proof of Disclaimer.*—A disclaimer or assertion of an adverse right, where possession is originally taken or held under the true owner, or by one joint tenant, tenant in com-

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mon or parcener, may be presumed from a great lapse with other circumstances which might warrant assumption, and proof of the fact is not required to be convincing as to preclude all doubt. It may be proved other fact involved in a civil case may be proved by substantial evidence, the probative value and sufficiency circumstantial evidence to sustain the burden of proof (i. e., by a preponderance of the evidence), being entirely for the jury.

9. **ADVERSE POSSESSION—Possession Held Under True Ownership—Proof of Disclaimer—Non-Residents.**—Non-residents labor under no disability with respect to the right to sue or prosecute suit at any time to assert or preserve any right of action they may have. No such right is reserved by statute. On the contrary when proceeded against by a writ of publication, etc., their rights in this respect are restricted and limited by sections 2986 and 3233 of Code of 1904. Therefore, the non-residence of one coparcener has no bearing on the question of fact as to whether the notoriety of the claimer and adverse claim of right of another coparcener in possession of the land was so long continued as to affect with constructive notice thereof, save in so far as the fact that he lived from the land and the adverse occupation of the land by the claimant and his lack of communication with those who were in possession of the land, such facts, may affect the question.
10. **LACHES—Prosecuting Pending Cause.**—The same rule applies to laches being a bar to the institution of a suit in equity. While mere lapse of time will not make this rule applicable where the delay results in the death of parties and the destruction of evidence, rendering it difficult to do justice between the parties, a court of equity will hold it too late to ascertain the truth of the controversy and will not interfere whatever may be the original justice of the claim. Accordingly a court of equity will, in such case, refuse to grant relief in a suit which has been long pending, although originally instituted within due time, equally as it will in such case, refuse to grant relief in a newly instituted suit.
11. **LACHES—Failure to Prosecute Pending Suit—Loss of Equity Case at Bar.**—Failure of other heirs to prosecute a suit for partition of a tract of land for more than thirty years, while a coheir in possession under a contract of sale, while the tract he claimed to have performed on his part, bars him from relief in another suit for the same purpose, where the loss of money of importance has been lost by the delay.

Statement.

Appeal from a decree of the Circuit Court of Albemarle county. Decree for complainants. Defendants appeal.

Reversed.

STATEMENT OF THE CASE AND FACTS.

This suit in equity was instituted in the Circuit Court of Albemarle county by Joseph E. Baber, one of the appellees, in November, 1909. The object of the suit was to have sale for partition among the parties entitled thereto of a tract of about 141 1-2 acres of land (sometimes referred to in the record as about 140 acres), formerly belonging to William Baber, Sr., deceased, the father of said appellee. The appellants (who are heirs at law of John H. Baber, deceased, a brother of said Joseph E. Baber and also a son of said William Baber, deceased), and other descendants of the last named decedent, were made defendants to the suit. The appellants, by their answer in such suit, set up the defense, in bar of the suit, that their father, the said John H. Baber, deceased, had, in his life time, acquired title to said land in fee by disseisin or ouster of his co-parcenors and by his adverse possession of such land for the statutory period; and that such title had passed to the appellants by descent from the said John H. Baber.

A petition and also an answer was filed in said suit in 1915 by one Mary C. Wilson, sole devisee under the will of James K. Baber, deceased (another son of the said William Baber, Sr., deceased), of all the "estate and property, real and personal" of the said James K. Baber, deceased, claiming the interest in said land which would have belonged to the latter if not barred by said alleged adverse possession of said John H. Baber, deceased.

A few days later in 1915 William L. Greene and J. E. Greene filed their answer in such suit, prayed to be heard as a cross-bill, and D. N. Greene filed his answer therein

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(said William L., J. E. and D. N. Greene being deceased under the will of Georgianna Greene, the latter being Georgianna Clatterbaugh at the time of her death in she having married a second time), claiming the interest in said land which would have belonged to the said Georgianna Greene, their great aunt, a daughter of said William Baber, Sr., if not barred by said alleged adverse possession of said John H. Baber, deceased.

THE FACTS.

The following writing is relied on by appellants as being given their ancestor, the said John H. Baber, as title to said land, namely:

"Exhibit "A." "This bill of bargain and sale made entered into this the 6th day of December, 1874, between M. Baber of Rockbridge Co., Va., and John H. Baber of Albemarle, Va. Witness the said William Baber hat day sold to the said John H. Baber a certain tract or parcel of land lying in Albemarle county, Va., adjoining lands of J. M. Henderson, Wm. R. Babers heirs and it being the land on which the said J. H. Baber now resides and containing 141 1-2 acres for one-half of the share of the said William Baber in the said plantation and the said William Baber to furnish Elizabeth Baber the mother of said John H. Baber and the wife of the said William Baber board and lodging *during* lifetime of said Elizabeth Baber.

"In witness whereof we have signed our names at the above date written.

WM. (his mark) BABER
JOHN H. BABER."

"Witness,
S. J. BABER."

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John H. Baber was living on and in possession of said land under and in privity of title with his father William Baber, Sr., at the date of such writing, hereinbefore referred to as "Exhibit A." Elizabeth Baber, his mother, lived only a short time thereafter, and died in 1875. The said William Baber, Sr., lived only a few months longer and died in 1875 also, before the fruit crop on said land for that year matured. The said John H. Baber, from the date of Exhibit A., lived upon said land until his death in 1908, a period of thirty-four years, approximately, continuously without any break in such possession, and some of appellants, his descendants, have continued to live upon said land ever since, without break in their possession of it.

There is some conflict in the testimony of the witnesses as to whether the said John H. Baber accompanied his said possession of said land by claim of title thereto in fee under Exhibit A., and as to whether he in fact discharged the consideration named in such writing so as in fact to entitle him to such land thereunder; but the preponderance of the evidence clearly establishes the fact that in 1878 at least, and from that time until his death, a period of thirty years approximately, the said John H. Baber accompanied his said possession of said land by claim of title thereto in fee under Exhibit A.; such claim of title being that he had discharged the consideration named in such writing by furnishing board and lodging to his said mother during her life time; that no merchantable fruit on said land matured between the making of said writing and the death of his father; that he had accordingly, since the date of such writing, Exhibit A., held possession of said land as the owner in fee thereof under such writing and continued such possession accompanied by such claim of title until his death.

Such claim of title and possession up to May 10, 1878, by said John H. Baber was made by his answer filed on such

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date, by leave of court per order of that date, in a the short style of *Herron v. Baber* instituted in the (in March, 1878) in the Circuit Court of Albemarle That suit (among other things), had for its object precisely the same thing as the suit before us, first above mentioned. That was a suit for sale of said land for partition. The said Joseph E. Baber and said Georgianna were parties defendant thereto, and so were other descendants of said William Baber, Sr., deceased, as well as said John H. Baber. The original of said Exhibit filed with the said answer of John H. Baber in that

The said James K. Baber was not a party to the *Herron v. Baber*, *supra*, but during the same year another suit for sale of said land for partition was instituted in Rockbridge county (including in its object the sale of other land in the latter county for partition). The short style of the latter suit was *Greene v. Baber*. In that suit the said James K. Baber was made a party defendant as a non-resident (he being then a resident of the State of West Virginia). The said Georgianna Greene (along with her husband Henry A. Greene) was a party plaintiff in such suit. The said Joseph E. Baber was not a party to this suit. Other descendants of said William Baber, deceased, as well as the said John H. Baber, were parties defendant thereto. Such cause of *Greene v. Baber* was, by order of the Circuit Court of Rockbridge county, May 14, 1878, removed to the Circuit Court of Albemarle county.

By decree of the Circuit Court of Albemarle county rendered May 17, 1878, the said causes of *Herron v. Baber* and *Greene v. Baber* were ordered to be heard together in court in such decree saying (among other things) that "said first named cause having been regularly matured and set for hearing according to law, came on this day for hearing and was heard upon the bill taken for confessed as to * * *

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anna Greene. * * * Joseph E. Baber, the answer of John H. Baber * * * with general replication thereto, on the exhibits and examination of witnesses. * * * And the second of said causes which has been regularly matured and heard as to all parties thereto in the Circuit Court of Rockbridge county and all the papers of which by an order of said circuit court have been transferred and certified to this court to be read (and) heard * * * with the first above named cause, the object of both suits being the same, the settlement of the estate of Wm. Baber, Sr., dec'd, is accordingly this day docketed in this court and is ordered to be * * * heard with said first named cause, and *it appearing that all the parties to said two suits are now before the court.* * * * etc. (Italics supplied). The only further provisions of such decree which concerned the above mentioned 141 1-2 acre tract of land was the following: "And it is further adjudged, ordered and decreed that it be referred to one of the commissioners of this court to take, state and report the following accounts, to-wit: * * * 3rd. An account showing what real estate in Albemarle county, if any, belongs to the estate of said W. Baber, Sr., and especially all the facts touching the title and ownership of the 141 1-2 acre tract of land near Batesville and showing to whom said tract belongs. * * *"

At that time all of said parties to said suits were living either in Albemarle or Rockbridge counties (except James K. Baber, who was then, and continued to be until his death in 1910, a resident of West Virginia), and they (except James K. Baber) and most of their descendants have continued to reside in those or adjoining counties up to the present time, except Silas J. Baber, who removed from Rockbridge county to Texas in 1882.

In 1881 an order was entered in said causes, heard together as aforesaid, directing a rule to issue against the special commissioner of the court therein, requiring him to

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report whether he had made sale of a certain tract in Rockbridge county and concerning the resale land if it had been sold.

On February 9, 1892, a decree was entered in such in which it was stated that the court, "without upon any other question," confirmed the sale of sa of Rockbridge county land, etc., making no refer the issue in these causes made by the adverse claim of John H. Baber aforesaid.

On February 17, 1892, the papers in such cause withdrawn from the clerk's office of the last name by Judge George W. Morris, an attorney at law pra in that court and his receipt was left therefor.

Nothing further was done in these causes of *Herron v. Baber* and *Greene v. Baber*, or either of them.

In October, 1895, an order was entered by the Court of Albemarle county striking a great num chancery causes from its docket, by their short sty der the statute on the subject, the order stating tha peared to the court "that nothing has been done (continue them for more than five years;" and amon causes appearing from such order to have been so s from the docket was that of *Greene v. Baber*. Fo this order, the cause of *Herron v. Baber*, as "ended No. 1773," as well as the cause of *Greene v. Ba* "ended cause No. 1772," was in fact "retired fro docket" under such order of October, 1895.

It will be observed that the statement in the last order to the effect that nothing had been done in th of *Greene v. Baber* for more than five years except tinue it, was an error.

The papers in said suit of *Herron v. Baber* were l no trace of them has been found since the receipt o by Judge Morris in February, 1892, as aforesaid.

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No proceeding was ever taken under section 3376 of Code of Virginia by Joseph E. Baber, Georgianna Greene or James K. Baber, or the said devisees of the latter (which are all the parties who, by said bill, petition and cross-bill in the cause before us, sought the relief aforesaid in the court below), or by any other parties in interest, to restore said lost papers of said chancery suit of *Herron v. Baber*, except that in said cross-bill filed in 1915, as aforesaid, the said suit of the appellee, Joseph E. Baber is asked to be heard as a suit under such section to restore such lost papers, and there is a prayer that said causes of *Herron v. Baber* and *Greene v. Baber* may be restored to the docket and for general relief, etc.

Pending the aforesaid delay of the said appellee in instituting said recent proceedings to obtain sale of said land for partition and their delay and that of those under whom the said petitioner and cross-bill plaintiffs claim, in seeking relief in said causes of *Herron v. Baber* and *Greene v. Baber* and in bringing to trial the same issue of adverse possession aforesaid involved therein as is now involved in said recent proceedings in the cause before us, the said John H. Baber died, and so did many of his co-parceners in said land, whose testimony upon said issue would have been of vital importance.

Further:

There was another suit instituted in September, 1878, in the Circuit Court of Rockbridge county, of the short style of *Spiece v. Baber*. That was a suit brought by John B. Spiece, claiming to be a creditor of R. S. Baber, deceased, a son of William Baber, Sr., deceased, setting up an alleged sale of said land to R. S. Baber by William Baber, Sr., and asking that it be sold to satisfy such debt of R. S. Baber; and the said John H. Baber, *ante motem litam*, in a suit brought by him against said Spiece, set up the same claim

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of adverse possession aforesaid, and, on June 26, 1884, obtained an injunction restraining and enjoining the defendant from taking possession of said land at the suit of said Spiece.

In his bill in this injunction suit the said John H. Baber alleged that in said suit of *Herron v. Baber* he had produced and filed the original contract aforesaid (Exhibit A) and subsequently took depositions and proved beyond question the execution of said contract and the performance of the part of the consideration agreed to be paid by him for said land; that such suit of *Herron v. Baber* was then properly dismissed and that "the plaintiffs in said suit have virtually abandoned their claims and have in effect admitted the right of your complainant (John H. Baber) to said tract of land."

By the delay of said appellees aforesaid the depositions referred to have been lost and the appellants have been deprived of that evidence to sustain the said issue of adverse possession on their part.

With the bill of said John H. Baber in said injunction suit is filed what purports to be a copy of said writing (Exhibit A), in the handwriting of Col. R. T. W. Duke, for John H. Baber therein, made by the latter from the original of such contract filed with the answer of John H. Baber in said suit of *Herron v. Baber*, as aforesaid. The copy of Exhibit A in the suit before us is a copy of such copy made by Col. Duke, the original having been lost with the dismissal of such suit of *Herron v. Baber*.

The decree complained of, so far as material, is as follows: "* * * the court having maturely considered the pleadings and the evidence adduced in this cause, and being of the opinion that the cause of *Greene v. Baber* was improvidently, illegally and by mistake stricken from the docket of the Circuit Court of Albemarle county, the court doth adjudge, order and decree that the said cause of *Greene v. Baber* be and the same hereby is restored to the docket of the said Circuit Court of Albemarle county."

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it appearing to the court from the papers in this cause that the papers in the suit of *Herron v. Baber* have been lost and it further appearing to the court that the present cause of *Joseph E. Baber v. James K. Baber et als.*, has for its object the same end and result as that sought by the said suit of *Herron v. Baber*, the court doth adjudge, order and decree that said suit of *Herron v. Baber* be and the same is to be heard together with the present suit of *Joseph E. Baber v. James K. Baber et als.*, and with said cause of *Greene v. Baber*, heretofore stricken illegally from the docket.

“And the court being of opinion from all the pleadings and the evidence adduced in this cause that the plaintiff, Joseph E. Baber, is entitled to maintain the prayer of his bill filed at 2nd December rules, 1909, and that the heirs of John H. Baber, deceased, are only entitled to a one-sixth interest in the funds in this cause, their said ancestor, John H. Baber, never having ousted his cotenants from the one hundred and forty (140) acre tract belonging to William Baber deceased, and never having had adverse possession of the same, and the other heirs of William Baber not having been guilty of any laches in respect to the said 140 acres of land, or the possession of the said John H. Baber therein, but being of opinion that the heirs of William Baber held the said 140 acres as co-tenants, each of his six heirs being entitled to one-sixth interest therein, doth therefore adjudge, order and decree that the said heirs and distributees of John H. Baber, deceased, shall not share in the funds in this cause to the exclusion of the other heirs and distributees of William H. Baber, deceased, but shall only receive one-sixth interest therein.”

R. T. W. Duke, Jr., for the appellants.

Chapman & Averill, N. W. Moores, Watson & Bolling and Alderson & Breckinridge, for the appellees.

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SIMS, J., after making the foregoing statement, delivered the opinion of the court.

Many interesting questions raised by the pleadings and assignments of error and argument of counsel on both sides of this cause need not be touched upon in this opinion, it being unnecessary for the decision of the cause, in the absence of it. Only the following questions, deemed to be material to the decision of this cause, will be considered and decided upon in their order as stated below:

1. Is Exhibit A, which is in effect a copy of the writing made by counsel, not authenticated by the clerk of the clerk of the court among the records of the court, the original was filed at the time such copy was made, admissible in evidence in the cause before us?

The original of the writing being lost, as afore said, at the time such copy was sought to be introduced in evidence in this cause, it was at that time impossible to obtain the original thereof certified by the clerk, and it was *then* the best evidence of such writing in existence. It at least tends to prove the contents of such writing, and under the best evidence rule it was admissible in evidence. The fact that at the time such copy was filed in the said injunction suit was not the best evidence and valid objection thereto have been made in that suit to its introduction in evidence therein, is immaterial upon the question as it arises in the cause before us. Such objection was not made in the injunction suit. If it had been it would have doubtless resulted in a copy of such writing duly authenticated in accordance with section 3334 of Code of Virginia being made in such suit. Such a result was impossible of attainment after the loss of the original writing and such statute have no application thereafter.

The authorities cited for appellees to sustain their contention that Exhibit A is not admissible in evidence

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not found to be in point. In *Payne v. Commonwealth*, 31 Gratt. (72 Va.) 855, the letter or paper was held inadmissible in evidence as tending to prove an admission by the accused, because the latter did not receive it or know of its existence. In *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329, the writing, held inadmissible in evidence to prove the fact therein stated, was a memorandum made by an attorney, to the effect that a certain deed had been executed. In the opinion of this court by Keith, P., it is said: "The question is not as to the authenticity of this paper. That may be conceded. What is its effect as proof in this case against the defendant?" And it was held inadmissible in evidence to prove the fact therein stated, under well settled rules of evidence having no application to the question under consideration in the cause before us. In *Carter v. Wood*, 103 Va. 68, 48 S. E. 553, the objection was not to the unauthenticated copy of a deed, but to the entire lack of proof that the deed copied was the original deed in question. Inferentially this case holds that an unauthenticated copy is admissible in evidence when the proof identifies the original from which the copy was made. To the same effect is the case of *Thomas v. Ribble*, 2 Va. Dec. 324, 24 S. E. 241. In *Johnson v. McCoy*, 112 Va. 580, 72 S. E. 123, it was held merely "that where a plaintiff claims title under a lost or destroyed paper the proof of its former existence, contents and loss or destruction, must be strong and conclusive before the court will admit a title to be established by parol evidence." The proof of the former existence of the original answer of John H. Baber and its loss, as set forth in the statement of facts above, is strong and conclusive. Therefore, even parol evidence would be admissible of its contents, under well settled rules on the subject, and, if such proof of its contents were strong and convincing, it would set up and establish the lost instrument. To the same effect is the case of *McLin v. Richmond*,

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114 Va. 244, 250, 76 S. E. 301. In *Snyder v. Charleston, etc., Bridge Co.*, 65 W. Va. 1, 63 S. E. 616, 131 Am. St. Rep. 947, it was held, merely, that, "before the contents of a lost paper can be properly given in evidence it is not only necessary to prove that it is lost and that diligent search has been made to find it, but its due execution as well." In the case of *Caperton v. Ballard*, 4 W. Va. 420, the contents of the lost letter in question were not material to the issue and for that reason such contents were not allowed to be proved.

Hence, these authorities are found not to be in conflict with the conclusion above reached on the question under consideration.

2. Was Exhibit A sufficient to give color of title?

This question must be answered in the affirmative. It is well to remember that the inquiry as to what is color of title is important only where, as in Virginia, color of title is held to give to the disseisor, who has *actual possession* of only a part of the land he claims, constructive possession of the whole of the land to the extent of the boundaries thereof covered by his color of title, in the absence of any interlock of conflicting bounds of the constructive possession of the true owner, due to some actual possession of the latter held under his title. *Taylor v. Burnside*, 1 Gratt. (42 Va.) 196; *Hunicutt v. Peyton*, 102 U. S. 333. 26 L. Ed. 113; *Koiner v. Rankin's Heirs*, 11 Gratt. (52 Va.) 420.

It is now well settled in this State that color of title must be by deed or will, or other *writing*, which purports or contracts to pass title, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom by the application thereto of the general rules governing the location of land conveyed by a deed. As stated, the title to which the writing gives the color, or semblance of title, may be an equitable as well as a legal

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title. It is inherent in color of title that the title claimed thereunder is invalid—is in fact no title—and the writing may indeed be absolutely void; but if the other requisites of the statute of limitation are complied with by the disseisor, it will constitute color of title. *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Sedg. & Wait on Trial of Land Titles*, secs. 767, 769.

The authorities, cited for appellees, of *Allen v. Paul*, 24 Gratt. (65 Va.) 334; *Newell on Eject.* 772, sec. 87; *Knight v. Grim*, 110 Va. 400, 66 S. E. 42, 19 Ann. Cas. 400; *Ritz v. Ritz*, 64 W. Va. 107, 60 S. E. 1095, are not in conflict with what is said above.

Exhibit A was a contract in writing, which, if performed on the part of the vendee, John H. Baber, would have passed the equitable title to said land to him. If his possession of the land was accompanied by the *bona fide* claim that he had performed his part of such contract and that he was entitled to the land thereunder, the contract gave him color of title.

It clearly appears from the facts in the cause before us that said John H. Baber was in actual possession of a part of the land involved therein continuously from 1874 until his death in 1908, and that certainly from 1878, when he asserted his claim of ownership of such land in the suit of *Herron v. Baber*, as set forth in the above statement of facts, until his death, he accompanied such possession by the *bona fide* claim that he was entitled to the land thereunder, and hence such contract gave him *color* of title and constructive possession of the land to the extent of its metes and bounds, for a period of approximately thirty years. This relieves us from the consideration in this cause of the question of whether the said John H. Baber in fact performed said contract on his part so as to have acquired a valid title to said land. The inquiry stops short

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of that with the ascertainment of the fact that he accompanied his possession aforesaid with the *bona fide* claim to have so done, and continued such possession unbroken for the statutory period.

It should be noted in connection with the question of the *bona fides* of the claim of title of John H. Baber under said contract (Exhibit A), that Silas J. Baber testified in this cause on November 26, 1913, in answer to interrogatories, as follows:

"18 Question: Did you ever know or hear of any contract of sale of your father's home place by your father William Baber to your brother, John H. Baber, during the life time of your father, William Baber?

"Answer: No, I never did hear of any such contract during my father's lifetime. * * *

"21 Question: Could your father William Baber write or read writing? Could he write his name?

"Answer: He could not write and could not read writing and could not write his name.

"22 Question: Did your father, William Baber, have any one especially to attend to his business for him and do his writing for him?

"Answer: Yes.

"23 Question: Who was said person?

"Answer: I, Silas J. Baber, was the person, and the only person, who attended to his business and did his writing for him. I did it all the time he lived with me and he lived with me from the year 1872 to the time of his death in the year 1875.

"24 Question: Did you ever witness any contract in writing of sale, purporting to have been made by your father, William Baber, to your brother, John H. Baber, to your father's, William Baber's, home place in Albemarle county in the State of Virginia?

"Answer: No, I never did."

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It will also have been noted, from the copy of Exhibit A, in the statement of facts above, that the name of S. J. Baber is signed thereto as the only witness. The effect of such testimony is to indirectly imply that the original writing evidenced by Exhibit A, was a forgery, but the testimony is noticeably scant in its reference to this subject. It is contained in the brief statement in the answer to the single question last above quoted. The witness is not asked about and he makes no reference to the specific contract in question. He does not explain his silence all these years as to this contract being a forgery; or how the forgery could have been perpetrated and the forged writing filed in a suit to which he and numerous others, jointly interested with him adverse in interest to the writing, were parties, and yet the forgery not be discovered or suspected or suggested; and how it should remain for him, by a broad general negative statement after the lapse of thirty-five years from the filing of such writing as a part of a court record in the suit aforesaid, to first state by indirection that it was a forgery. The answer too of Silas J. Baber, filed in the cause before us, contains no allegation that the writing in question was a forgery, does not directly charge John H. Baber or any one, indeed, with having forged it; but by indirection of statement seeks to create that impression. It is not by such character of allegation or of proof that a charge of this character can be established. The fact that such writing was so filed as aforesaid, subject to scrutiny by so many who, knowing that William Baber, Sr., could not read or write, would naturally look to see by whom it was witnessed, would, as it seems to us, have led to such witness being questioned about it and to the detection of the forgery long since, if it existed. This and the unexplained silence of the witness all these years, and the other circumstances surrounding the case, set forth in the statement of facts above, constitute a decided preponderance of evidence

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against the appellees upon the issue that such writ was a forgery and was known to be such by John H. Baber. After this lapse of time, under the circumstances of this case, the latter must be taken to have considered such writ as being genuine and to have *bona fide* asserted his claim thereunder.

Therefore, unless for some other reason it is found that the requisites of the statute of limitations were not complied with by the said John H. Baber, it is evident that he has acquired complete title to the land in question under the statute in his lifetime, by adverse possession, and such title has descended to the appellants, who are his heirs at law.

It is contended on the part of the appellees that the requisites of the statute were not so complied with by John H. Baber, that there was no disseisin or ouster by said John H. Baber or of his coparceners entitled to said land by descent from the said William Baber, Sr., deceased, because the pendency of said suit of *Herron v. Baber* prevented the running of the statute of limitations, and, indeed, any commencement of the running of such statute, in favor of John H. Baber. It is preserved the rights of the appellees to such land in such suit and involved in such suit from the bar of such statute.

This involves the consideration of the following questions, which will be passed upon in their order and in the following manner below.

3. The possession of John H. Baber having been lawfully taken under the true owner, William Baber, Sr., and the claim of title of the former accompanying his possession of the land for a continuous period of fifteen years and more before his death, such a clear, positive and continued disclaimer and disavowal of title of said land by John H. Baber, Sr., and of the heirs at law of the latter, as to constitute a disseisin or ouster of such heirs?

As said by Lacy, J., in delivering the opinion of the court in *Fry v. Payne*, 82 Va., at p. 761, 1 S. E. at p. 190.

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the possession of one joint tenant, tenant in common, or parcener, is *prima facie* the possession of his fellow (and) it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster or disseisin or other act amounting to a total denial of the plaintiff's right as cotenant." To the same effect, *Purcell & Wife v. Wilson*, 4 Gratt. (45 Va.) 16; *Caperton v. Gregory*, 11 Gratt. (52 Va.) 508; *Buchanan v. King*, 22 Gratt. (63 Va.) 422; *Robinett v. Preston*, 2 Rob. (41 Va.) 273; *Hannon v. Hannon*, 9 Gratt. (50 Va.) 146; *Pillow v. Southwest, etc., Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Chapman v. Chapman*, 91 Va. 409, 21 S. E. 813, 50 Am. St. Rep. 846; *County of Alleghany v. Parrish*, 93 Va. 615, 25 S. E. 882; *Nowlin v. Reynolds*, 25 Gratt. (66 Va.) 137, and many other Virginia cases on the subject.

As said by this court per opinion of Staples, J., in *Creekmur v. Creekmur*, 75 Va. 430, at p. 436: "The rule now is that where possession is originally taken or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and assertion of an adverse right to be brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitation. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortuous (tortious) and wrongful by the disloyal acts of the occupying tenant, which must be open, continuous and notorious, so as to preclude any doubt of the character of the holding or the fact of knowledge on the part of the owner." See also authorities next above cited.

However, the notice to or knowledge of the coparceners, or others originally having privity of title with the disseisor, of his disclaimer aforesaid and assertion of an adverse right, required to be proved before the running of the statute of limitations will begin, need not be actual. It

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may be constructive. *Stonestreet v. Doyle*, 75 Va. p. 378, 40 Am. Rep. 731; *Va. Coal, etc., Co. v. Hyl* Va. at p. 424, 79 S. E. 337, Ann. Cas. 1915a, 741. It presumed from a great lapse of time with other instances which may warrant such presumption. *& Wife v. Wilson*, *supra*; *Pillow v. Southwest*, *e supra*. The proof of such fact is not required to be convincing as to preclude all doubt." *Reusens v.* 91 Va. at p. 237, 21 S. E. at p. 350. It may be proved by any other fact involved in a civil case may be proved by circumstantial evidence, the probative value and sufficiency of the circumstantial evidence to sustain the burden of proof required (*i. e.*, by a preponderance of the evidence) being entirely with the jury. 1 *Greenes Ev.* (15 ed.) 13 and note; 2 *Whart. Ev.*, sec. 1246; *Best Presur* sec. 190; *Ellis v. Buzzell*, 60 Me. 209, 211, 11 A. 204, cited with approval in *Reusens v. Lawson*, *sup*

On May 17, 1878, appellee, *Joseph E. Baber*, testified in the original bill in the cause before us, and *Gianna Green*, under whom claim the appellees were, plaintiffs in the cross-bill filed in this cause, certain constructive notice of the disclaimer by *John H. Baber* of the common title and of the assertion by him of an adverse right aforesaid accompanying his possession of the land in question, by reason of their being then before the court in the causes of *Hernon v. Baber* and *Greene v. Baber*, together, and of the allegations of the answer of *Joseph E. Baber* filed therein setting up such disclaimer and asserting such right in bar of the relief of sale of said land for partition sought in such suits, as appears in detail from the statement of facts. *Joseph E. Baber* is still living. *Gianna Greene* lived until 1911. *Joseph E. Baber* from May 17, 1878, until he filed his bill in the cause before the court, and *Giorgianna Greene* from May 17, 1878, until her death, constructive notice of said disclaimer and assertion

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verse right by John H. Baber accompanying his open, notorious and continuous possession of the land aforesaid. Moreover the *ante motem litam* assertion of such adverse right by John H. Baber in the suit of *Spiece v. Baber* and his obtaining an injunction on the ground that he was entitled to said land under such adverse right, as set forth in the statement of facts above, while not of the same weight as evidence of constructive notice aforesaid to said Joseph H. Baber and Georgianna Greene since they were not parties to the last named suit, was a notorious assertion of such adverse right, which being maintained as it was thereafter for so great a lapse of time, is a pregnant circumstance to be considered on the question of fact whether notice to and knowledge of the assertion thereof aforesaid is to be inferred or presumed to have been brought home to said Joseph H. Baber and Georgianna Greene. See *Caperton v. Gregory, supra*; *Purcell & Wife v. Wilson, supra*; *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597.

With respect to James K. Baber, under whom the petitioner appellee claims, as set forth in the above statement of facts, the question under consideration arises under a somewhat different aspect. The same conclusion reached in the next preceding paragraph applies to James K. Baber, and hence to such petitioner claiming under him, however, unless the fact that James K. Baber was a non-resident of Virginia distinguishes the case as to him. He lived until 1910 and was on May 17, 1878, and thereafter until his death, not a resident of Virginia, but of West Virginia. An allusion is made in *Purcell & Wife v. Wilson, supra*, to the rule above adverted to, with respect to the presumption of the notice and knowledge aforesaid from lapse of time with other circumstances which may warrant such presumption, and it is there stated that such presumption will not arise against those "laboring under disabilities;" but manifestly such allusion is to persons who fall within the

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saving provisions of the statute on the subject of persons under disabilities and has reference to the time in which they may bring suit to assert their rights. (Sec. 2931, Code of Va.) ; and has no reference to non-residents.

Non-residents labor under no disability with respect to the right to institute or prosecute suit at any time to assert or preserve any right of action they may have. No such right is reserved to them by statute. On the contrary when proceeded against by order of publication, etc., their rights in this respect are restricted and limited by sections 2986 and 3233 of Code of Virginia. Therefore, the non-residence of James K. Baber has no bearing upon the question of fact as to whether the notoriety of the disclaimer and adverse claim of right aforesaid of John H. Baber, accompanying the actual possession of said land by the latter, as aforesaid, was such and so long continued as to affect the said James K. Baber with constructive notice thereof, save in so far as the distance he lived from the land and the adverse occupant and claimant and his lack of communication with those who knew such facts, may affect the question. But in view of the facility of communication in modern times, the known disposition of men to make inquiry within a reasonable time about rights of property and of their disposition to realize upon their interest in the estates of those from whom they inherit, the presumption seems reasonable that James K. Baber within a reasonable time after the death of his father, William Baber, Sr., made inquiry in Virginia with regard to said land and that by the year 1878, or 1879 at least, was informed of what the numerous other members of the family interested with him must be taken to have known, of the notorious disclaimer and adverse claim of title of the said John H. Baber accompanying his actual possession of the land aforesaid. Hence, under the circumstances of the cause before us, our conclusion is

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that the said James K. Baber must be taken to have had the constructive notice and knowledge aforesaid from 1878 or 1879 until his death in 1910.

It should be noted that it is alleged in the said answer of Silas J. Baber, above mentioned, that "after the death of William Baber, said John H. Baber endeavored to buy out respondent's interest in the old home place, the last time during the occasion of the Confederate reunion in 1906 or 1907, the place of such offer being North Garden depot, in Albemarle county, Virginia, just about the time this respondent was about to catch the train for his home in Texas." No allegation is made of any letter having been written to him by John H. Baber on the subject of buying respondent's interest in the land.

In answer to interrogatories on April 30, 1912, (after the death of John H. Baber) said Silas J. Baber testified as follows:

"15 Question by counsel for plaintiff: After your father's death did your brother John H. Baber continue to occupy the said farm in Albemarle county? And during his said occupancy did he ever write a letter to you asking you at what price you would sell your interest in the said place? If so state the year the letter was written and state whether or not you now have said letter? And, if you have it not, state what became of it? If you state that you are unable to find said letter state the contents of same if you know what they were?

"Answer: Yes, John H. Baber continued to occupy the farm. Yes, he wrote me a letter asking me what I would take for my interest in the farm. This letter was written in 1887 and asked what I would take for my part of the old home place in Albemarle county. I have not got the letter now. It is lost and I am unable to find it. He asked me if I would sell my interest in the place and if so what I would take for it.

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"16 Question by counsel for plaintiffs: Since the 1887 have you or your brother, John H. Baber, had any further communication or conversation in regard to the place proposing to purchase your interest in the old place near Albemarle county, and if so when, where and what was the communication or conversation in regard to the purchase of your interest in the said place?

"Answer: Yes, we had a conversation concerning the purchase by him of my interest to the place. I was in Virginia at the Confederate reunion in Richmond just a few years ago, I think it was in 1906 or 1907, and had a conversation at the North Garden depot in Albemarle county just as I was taking the train to leave and he asked me then if I would sell and if so what I would take for my interest in the place."

This testimony was objected to by appellants as inadmissible under section 3346, Code of Virginia, clause 2. In the view we take of the case it is unnecessary for us to pass upon that question.

Silas H. Baber was a party defendant to said suit in *Herron v. Baber*, and he was in May 1878, "before the court" in that suit, in which the answer of John H. Baber aforesaid was filed as aforesaid. He lived in Rockbridge county from 1871 or 1872 until 1882, four years after John H. Baber set up his claim of adverse ownership in said place, three years after the injunction obtained by John H. Baber aforesaid. It is significant that Silas J. Baber does not deny in his answer aforesaid knowledge of said adverse claim of title by John H. Baber before his removal to Texas, nor does he deny that there was adverse possession by the latter, but contents himself with alleging on the subject that his father, William Baber, Sr., told him that he was not getting any rent from the old place near Rockville, occupied by John H. Baber, which said rent would be paid in the shape of one-half of the merchantable

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raised on said place and that up to a short time before his said father's death, he continued to complain to that effect, saying that the only reason he did not make John H. Baber vacate was because he, the said John H. Baber, was poor and had a large family to support," and that "if any acts (of) adverse possession were exercised by John H. Baber that such were not *brought home* to this respondent, who has been making his home since the year 1882 in the distant State of Texas." (Italics supplied). If the testimony of Silas J. Baber next above referred to were admissible in evidence it is in direct conflict with record evidence in the cause set forth in the above statement of facts showing that John H. Baber beyond question made the disclaimer and assertion of adverse title aforesaid and in view of the facts above stated such testimony is too vague and indefinite to out-weight the other testimony in the cause on the subject.

But it is contended for appellees that if the foregoing conclusions be correct, nevertheless the pendency of said suit of *Herron v. Baber* prevented the running, and indeed the commencement of the running, of the statute of limitations; that such suit, in equity and hence in contemplation of law, is still pending; and they rely on that suit to save them from the bar of such statute.

It is true that if the parties to the suit of *Herron v. Baber* had prosecuted their rights therein with reasonable diligence the pendency of that suit would have prevented the running of the statute of limitations in favor of the claim of title by adverse possession set up therein in defense of that suit by John H. Baber. However, in the view we take of the case it will not be necessary to enter upon the consideration of what was the effect of the order of court in 1892 dismissing the cause of *Greene v. Baber* from the docket under the five year statutory rule on the subject, when, in fact, the order was in

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error in stating that nothing had been done in such save to continue it for more than five years; or of w such order carried with it the dismissal of the ca *Herron v. Baber* from the docket of the court. In ou of the case, the decision of the following question cisive of the inquiry as to the right of appellees to r the suit of *Herron v. Baber* to save them from the the statute of limitations aforesaid, namely:

4. Has the laches of the appellee, Joseph E. Baber of those under whom the other appellees claim as af barred their right to rely upon said suit of *Herron v. Baber* to preserve the rights they assert in the cause us, and likewise barred them from the assertion rights claimed by them in such last named cause?

The same rule with respect to laches being a bar institution of a suit in equity applies to the right to f prosecute a pending cause. *Dismal Swamp Land McCauley's Adm'r.*, 85 Va. 16, 6 S. E. 697; *Harrison son*, 23 Gratt. (64 Va.) 212; *Bargamin v. Clarke*, 20 (61 Va.) 544; and many other Virginia decisions to erous to cite.

The equity rule on this subject has been so often that it is unnecessary to restate it here. It is deemed to say that while mere lapse of time will no this rule applicable, where the delay results in the of parties and the loss of evidence, rendering it difficult to do justice between the parties, a court of equity will not do it "too late to ascertain the merits of the controversy" and will not interfere whatever may have been the effect on the justice of the claim." *Hatcher v. Hall*, *supra*. According to a court of equity will, in such case, refuse to grant relief in a cause which has been long pending, although originally instituted in due time, equally as it will, in such case, refuse to grant relief in a newly instituted suit.

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In the cause before us, the nature of the original main question of fact at issue, to-wit, whether John H. Baber performed the contract, Exhibit A, in the lifetime of his mother and father, both of whom died in 1875, rendered the testimony of contemporary witnesses almost indispensable. Such testimony it seems was promptly taken by John H. Baber soon after the original suit of *Herron v. Baber* was instituted against him. This testimony has been since lost by the loss of the papers of such suit. Whether John H. Baber subsequently accompanied his possession of the land involved in this cause by the disclaimer of adverse title aforesaid rendered of especial importance his own testimony, concerning as it does his own personal action, and of considerable, although of lesser importance, the testimony of his former coparceners, on the question of their knowledge of his disclaimer and assertion of adverse title aforesaid.

This testimony has been lost to the appellants by the delay of appellees in prosecuting their alleged rights in the suit of *Herron v. Baber*, and in instituting the cause before us, until after the death of John H. Baber.

We cannot avoid the conclusion, therefore, that their laches has barred the appellees from the right to any relief in the premises.

For the foregoing reasons we are of opinion to reverse the decree complained of, and this court will enter such order as the court below should have entered dismissing the bill of the appellee and plaintiff, Joseph E. Baber, and all other proceedings, by petition and cross-bill and otherwise, on behalf of the other appellees in the court below.

Reversed.

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Richmond

BOARD OF SUPERVISORS OF BOTETOURT COUNTY *v.* C
AND OTHERS.

November 15, 1917.

1. STATUTES—*Construction—Mandatory or Permissive.*—TH many cases where “may” has been construed to mean and where a permit, in other language, has been construed into a command. There may be a duty coupled with power, and where this is true usually the power must be exercised though conferred in merely permissive language. Permissive words are often construed as mandatory when public interest and rights are concerned, and where third persons have a claim *de jure* that the power conferred shall be exercised.
2. STATUTES—*Construction—Mandatory or Permissive—Bar.*—The title of an act was, “An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, so much thereof as may be necessary,” etc., and by the same clause the board was *authorized and empowered* to borrow \$90,000, or *so much thereof as may be necessary* for the purposes declared. This language is not equivocal, but plain and unambiguous, and the circumstances of the case do not disclose any duty resting upon the board to exercise the power conferred. They were given a discretion in the matter, which they exercised when they refused to issue the bonds, and the lower court was without jurisdiction to set aside or annul its action.

Error to a judgment of the Circuit Court of Botetourt county, awarding a mandamus.

Reversed.

The opinion states the case.

Haden & Haden, for the plaintiffs in error.

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Wm. R. Allen, for the defendants in error.

BURKS, J., delivered the opinion of the court.

The title of chapter 112, Acts 1916, is as follows: "An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, or so much thereof as may be necessary, for the purpose of making permanent improvements in certain public roads and bridges in Fincastle district of said county." The enacting clause of that chapter is as follows: "Be it enacted by the General Assembly of Virginia, that the board of supervisors of Botetourt county be, and they are, hereby authorized and empowered to borrow the sum of ninety thousand dollars, or so much thereof as may be necessary, for the purpose of permanently improving such public roads in Fincastle district as are hereinafter designated, and to issue bonds of said county," etc. Section 1 declares, "the said bonds may be either coupon or registered, as the said board may prescribe; they shall be signed by the chairman of said board of supervisors and countersigned by the clerk thereof; shall be in the denomination of five hundred dollars, or some multiple thereof; shall bear interest at a rate not to exceed five per centum per annum, payable annually on the first day of January, at the office of the treasurer of said county, and shall be payable in thirty years from the date thereof at said office; but thirty-five thousand dollars of said bonds (numbered from one to seventy, consecutively) shall be subject to call after the expiration of ten years from the date of issue and the remaining fifty-five thousand dollars, shall be subject to call after the expiration of twenty years from the said date; but no bonds issued under this act shall be sold for less than their par value." Section 2 declares that the "ninety thousand dol-

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lars shall be distributed for work upon the roads." Then follows a description of roads amount appropriated to each, stating in each whether the road is simply to be graded, or graded and macadamized. In several instances the location of the work is left to the discretion of the supervisors. This section closes with the following paragraph: "The amounts are specified for the purpose of showing how the money of said money may be used and on what roads, but the amount specified for any particular road be less than the amount required for such road, then the deficiency thereof shall be used for the grading of and work on such road, if any, for which an inadequate amount is specified, the sum total of this bond issue to be fixed by estimate furnished by a competent person, but the aggregate is not to exceed in any event the sum of ninety thousand dollars. Section 3 declares: "The board of supervisors shall, when this act takes effect, issue as provided above and deliver said bonds to the treasurer of said county," who is to deliver them to the purchaser upon payment of the purchase price. The act makes the treasurer and his sureties liable for the bonds received, and fixes the treasurer's compensation. Section 4 provides for a levy on the property in the district sufficient sum to pay the interest and create a sinking fund. Section 5 is in the following words: "The need for said district requiring the immediate issue of said bonds, an emergency is declared to exist for this act, and this act shall be in force from its passage."

We have given thus fully the contents of the act, largely its language, because greatly relied upon by counsel for the appellees to show the mandatory character of the act.

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Shortly after this statute was enacted, the board of supervisors applied to the State Highway Commission to make estimates of the cost of the work contemplated by the act so that the board might carry out its provisions. The estimates were made and furnished to the board, but it appearing to the board that no one of the roads could be improved in the manner provided by the act for the sum allotted for the purpose, and that the aggregate cost of the improvements contemplated by the act far exceeded ninety thousand dollars, the board of supervisors declined to issue the bonds or to enter upon the improvements contemplated by the act.

A number of citizens of the district, feeling aggrieved by this action of the board, applied to the Circuit Court of Botetourt county for a writ of mandamus to compel the board to issue said bonds and otherwise carry out the provisions of said act of assembly. Petitioners insist "that the issuing of said bonds by the said board of supervisors is shown by the said act to be purely of a ministerial character, is imperative in its nature, and about which the said board of supervisors had no' discretion whatever." The answer of the supervisors insisted that the powers vested in them were discretionary, and that the court was without power to control their discretion. In support of their contention, and also to show the wisdom of their action, the board offered evidence which was not disputed, as follows:

"These estimates showed that the ninety thousand of bonds provided for in the act, as distributed by the said act, would not be sufficient to complete any of the roads mentioned in the act. The act allowed \$22,000.00 on road from Eagle Rock to Craig county line, and the estimates on this road were \$41,000.00 including bridges, and \$36,000.00 not including bridges. The act allowed for grading

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and macadamizing road from Eagle Rock to Albemarle county line the sum of \$30,000.00, and this amount would have graded the road, and macadamized only two or three miles, while the road was about 14 miles long. The sum of \$18,000.00 was allowed to be spent on the macadamizing from Eagle Rock to Fincastle, which is now being constructed, and the amount would not have completed the rock road, leaving two or three miles not macadamized. The amount allowed by the said act on each of the roads mentioned in the said act was likewise insufficient to complete them.

"The board, therefore, deemed it inexpedient to issue \$90,000.00 of bonds. The board doubted that a majority of the qualified voters of Fincastle district wanted the bonds issued, and after the estimates showed that the amount was greater than the amount allowed in the act, the board doubted the wisdom of issuing the bonds, and the said board offered to hold an election on the subject. If the election would necessarily have been held under the general law, on estimates furnished by the State Highway Commission, and the work done according to its specifications, but it has been my idea and understanding of the law that the work would have to be done according to the specifications of the State Highway Commission, whether the bonds were issued under the special act, or in the pursuance of an election.

"The advocates of the bond issue under the special act said they doubted if an election under the general law would carry, and they were, therefore, opposed to an election. If an election was then ordered, and the board declined, for the reasons above stated, to issue the bonds under the special act, and the board construing the said act as permissive and not mandatory."

The circuit court, however, entered an order re-

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the supervisors "immediately upon receipt of this writ and without delay to borrow the said sum of ninety thousand dollars, or so much thereof as may be necessary, for the purpose of permanently improving such public roads in Fincastle district of said county as are designated in the said act, and to issue the bonds of the county of Botetourt therefor as set out and provided in chapter 112 of the Acts of the General Assembly of Virginia, session of 1916, approved March fourth, 1916, and generally to do and perform all such acts as are necessary to carry out the provisions of said act." To this order and judgment of the circuit court this writ of error was awarded.

The sole question presented for our consideration is: Is chapter 112 of Acts of 1916 mandatory on the board of supervisors of Botetourt county, or not?

The title of the act is, "An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, or so much thereof as may be necessary," etc., and by the enacting clause the board is *authorized and empowered to borrow \$90,000, or so much thereof as may be necessary*, for the purposes declared. These are permissive words, conferring a power that did not otherwise exist, and *prima facie* at least appear to invest the board with a discretion which it could exercise or not as its judgment dictated. But the character of a power thus conferred is not to be determined solely by the language of the act conferring the power. There are many cases where "may" has been construed to mean "shall," and where a permit, in other language, has been construed into a command. There may be a duty coupled with the power, and where this is true usually the power must be exercised though conferred in merely permissive language. There are many cases illustrating this principle, though the language of the courts has not been uniform in its expression.

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In *Supervisors v. United States*, 4 Wall 435, 18 419, an act of the Illinois legislature was entitled, "to enable counties owing debts to liquidate same," the body of the act it was declared that, "The board of supervisors * * * in such counties as may be owing which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a tax * * * to be expended * * * in liquidating such indebtedness." The relator in that case had received a *judgment* against the county upon past due coupons of a debt owing by the county. The Supreme Court of the United States held the language of the statute to be mandatory, and not merely permissive. Mr. Justice Swain, delivering the unanimous opinion of the court used the following language: "The conclusion to be deduced from the authorities is that where power is given to public officers by the language of the act before us, or in equivalent language, whenever the public interest, or individual rights require its exercise, the language used, though permissive is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. Where power is given, not for their benefit, but for his benefit, placed with the depository to meet the demands of justice, right and prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and which otherwise be remediless." The report of this case contains a good collection of cases on both sides of the question under consideration.

In *City of Galena v. Amy*, 5 Wall. 705, 18 L. 419, where an act amending a city charter said that the city "may if it believe that the public best interests of the city require it," levy a tax to pay its *funded debt*, it was held that a mandamus would lie at the suit of a judgment creditor to make it levy the tax. In other words, that the language

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was to be construed as mandatory. The court said, amongst other things: "This power (conferred by the section above quoted) has not been exercised by the city authorities, and they have made no other provision for liquidating the debts due the relator. They have no other means of payment, in possession or in prospect. * * *

"The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases the power is in the nature of a trust for his benefit, and it was the plain duty of the court below to give him the remedy for which he asked. * * * These principles were fully considered in *Supervisors v. United States*, 4 Wall. 435 [18 L. Ed. 419] * * * and it is sufficient to refer to that case for a fuller exposition of our view upon the subject."

In *People v. Commissioners of Highways*, 130 Ill. 406, 22 N. E. 833, 6 L. R. A. 161, some one had built a fence across a public highway which diverted the travel over the land of an adjacent owner, who applied for a mandamus to compel the commissioners to remove the obstruction. The court in construing section 71 of the Illinois statute, said: "The language of section 71 is 'that the commissioners after having given reasonable notice * * * may remove any such fence or obstruction.' We think it was intended by the statute to impose upon the commissioners the imperative duty of removing obstructions from the public highway, and that the word 'may' is to be construed as 'shall.' The word 'may' in a statute will be construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers; and such is its meaning in all cases where the public interests are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de iure* that the power shall be exercised."

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In *People v. Board of Supervisors*, 51 N. Y. 401, of the act under consideration was, "An act providing relief against illegal taxation." The language of section of the act provided that the board of supervisors of the several counties mentioned, "are authorized and empowered, upon the application of any party aggrieved, to hear and determine any claim of assessment of taxes in their respective counties upon United States stocks, or other securities, which by law are or have been exempted from taxation, and to repay to the proper owner the amount collected or paid upon such assessment." The act further provided that whenever such claim was determined and allowed the supervisors should levy the amount upon the taxable property of the county. A bank had *paid taxes* on such securities several years before the act was applied to the supervisors to have the taxes so paid allowed and refunded as provided in the act, but the supervisors refused to audit the claim or to direct its payment, claiming that the act under which the refund was demanded was merely permissive, but the Supreme Court awarded a writ of mandamus directing the supervisors without delay to determine, audit, and allow the claim, and to pay the amount thereof by tax as required by said act. The Court of Appeals of New York, in its opinion, said: "The question to be determined is whether the act was permissive or mandatory to the boards of supervisors. To determine this question, not only the language of the act but the circumstances surrounding its passage and the object it had in view, must be considered. The highest judicial authority in the land had decided that these taxes were illegally exacted. The relator, therefore, had based upon natural justice and equity, that the taxes should be refunded, and as there was no way to compel the supervisors to refund them, the act was passed. The title of the act shows that it was to provide against illegal taxation."

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The relief would be quite illusory if it were left to the absolute discretion of the board of supervisors of any county to refund the taxes or not, as it might see fit. The act recognizes the party who has paid the taxes as an aggrieved party, who has a claim against the county which is to be audited and allowed like other claims against the county. It is not to be presumed that the legislature intended that the counties and towns which had the benefit of this illegal taxation should have the option, through their supervisors, to determine whether they would do justice to the wronged taxpayer by refunding the taxes illegally exacted, or not. The purpose of the act, as well as the simplest justice, requires that we should hold that it is mandatory upon the respective boards of supervisors, unless there is something in the plain language used that forbids such a construction."

In *People v. Board of Supervisors*, 68 N. Y. 115, the court had under consideration an act entitled, "An act for the relief" of Conway and others, and the first section of the act provided that the "board of supervisors * * * is authorized to adjust and audit the claims" of Conway and others, and the second section provided that "the said board may cause to be levied and collected such sums, etc." It seems that Conway had built a bridge connecting two towns under contract with the commissioners of highways of the two towns. The towns refused to pay the contract price, and it was held that as they were not bound to build or repair the bridge they were not liable upon the contract, and the county was held not liable because not a party to the contract and had not ordered the construction of the bridge. Under these circumstances the act above mentioned was passed by the legislature. In holding the county bound to audit and pay the claims of Conway and others, the court said: "Where it is merely indifferent whether a thing shall be done or not, then the word 'may' in an act is usually con-

strued to confer a permissive authority; but where public interest or private right requires that the thing be done, then the word 'may' is generally construed the same as 'shall.' In such a case it must be presumed it was the legislative intent to confer the authority for the purpose of promoting the public interest or securing private right. In this case the legislature, knowing Conway had built a bridge over a public highway * not be supposed to have left it discretionary with the representatives of the public whether they would pay or not."

Many other cases might be cited to the same effect, but it is as clear a statement of the law as can be found. It is given by Lord Cairns in *Julius v. Bishop of Oxford*, 5 App. Cas. 214. Construing the meaning of the words "it shall be lawful," his lordship said: "The question has been argued, and has been spoken of by some of the judges of the courts below, as if the words 'it shall be lawful' might have a different meaning and might be differently interpreted in different statutes or in different parts of the same statute. I cannot think that this is correct. The words 'it shall be lawful' are not equivocal: they are clear and unambiguous. They are words merely making legal and possible which there would otherwise be no legal and authority to do. They confer a faculty or power, but they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object of the thing which it is to be done, something in the condition of the thing which it is to be done, something in the title of the thing, or persons for whose benefit the power is to be exercised, something which may couple the power with a duty, and make it a duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described

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question which, according to our system of law, and speaking generally, it falls to the Court of Queen's Bench to decide on an application for a mandamus."

Our own decisions are to the same effect. In *Bean v. Simmons*, 9 Gratt. (50 Va.) 389, 391, the court in construing the language, "may be allowed to file an answer," said, "the general rule in the construction of statutes is that the term 'may,' when used in a statute, means 'must' or 'shall' in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the powers shall be exercised." To the same effect, see *Radford v. Fowlkes*, 85 Va. 820, 828, 8 S. E. 817, and cases cited. In *Lee v. Mutual Life Ass'n.*, 97 Va. 160, 33 S. E. 556, in construing an act of assembly which declared that the court 'may' order an action or suit to abate as to any party improperly joined, and proceed to judgment as to the others, it was held that "may" meant "shall;" and in *Pearson v. Supervisors*, 91 Va. 332, 21 S. E. 483, where the statute provided that, "at the request of any elector in the voting booth who may be physically or educationally unable to vote, the said special constable may render him assistance by reading the names and offices on the ballot and pointing out to him the name or names he may wish to strike out, or otherwise aid him in preparing his ballot," it was held that "may render him assistance," was mandatory and not merely permissive. But in all these cases the third person had a claim *de jure* to have the power exercised in his favor.

It remains, therefore, to be considered whether in the instant case the power conferred upon the board of supervisors is coupled with the duty which renders the language of the statute mandatory.

It has been earnestly contended before us that the many mandatory provisions of the act, which have been hereinbefore set forth, indicate the intention of the legislature to make mandatory the provision of the enacting clause by

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which the board is "*authorized and empowered*" to the money, but a careful reading of the act discloses every mandatory provision of the act is hypothecated to the assumption that bonds *have been issued*, and that the act abounds in such provisions throws no light on the question of whether the provision for their issue is mandatory or discretionary. This question is to be determined from other considerations.

The words "authorized and empowered" are not legal; they are plain and unambiguous. Is there, the thing in the nature of the thing "authorized and empowered," anything in the object for which it is to be done which makes it the duty of the supervisors to issue bonds when called upon to do so? If not, the words must be construed according to their plain and ordinary meaning. There is no debt owing, for the payment of which the county ought to provide. There is no obligation resting on the county which the *ends of justice* demand should be charged. There is no trust imposed for the protection of the health, morals, safety or welfare of the community. No obligation is imposed upon the board to right a wrong which has been done, or to correct an injustice of any kind. The act imposes no obligation upon the board to keep the highways open and in a reasonably safe condition for public travel, but "authorizes and empowers" the board to borrow money for the *permanent improvement* of certain ways in the county. The object of the act is not to charge an existing obligation, but to authorize the board to inaugurate a permanent improvement, and thereby to create a large liability. The expediency of doing the act in the manner authorized by the act, is a matter concerning which there is serious difference of opinion. If this is the case, it cannot be said that the power is conferred with a duty, and words of permission will not be converted into commands.

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Whether or not the county roads shall be permanently improved, and, if so, whether the improvement shall be made gradually by direct taxation, together with State aid, or by bond issues, either for the whole county or for certain districts thereof, are questions of grave importance upon which there has been no unanimity of opinion. Some of the counties have adopted one plan, others another. In order to meet the situation, the legislature has by general laws, made provision for giving aid by the State under conditions, and to the extent provided by law, and for issuing bonds of the county when desired. (Acts 1908, p. 90: Acts 1916, p. 461). No bonds, however, can be issued under the general law until after an election has been held on the subject, and it has been ascertained, as the result of such election, that it is the desire of the qualified voters of the district or county that they shall be issued. The matter is left entirely in the hands of the local communities. No instance of a departure from this policy of leaving to the local communities the decision of whether or not bonds shall be issued for road improvements has been brought to our attention, nor do we know of any, and yet if the contention of the defendants in error be upheld, the legislature has taken from the people of Botetourt county, and from the Fin-castle district in said county, all choice in the matter, and compelled the supervisors of the county to issue bonds of the county to the amount of ninety thousand dollars for the improvements mentioned in the act, although no one of the roads mentioned in the act can be improved in the manner therein provided, for the sum set apart for that purpose. Furthermore, it is a matter of common knowledge that, as a result of the great war in which we are engaged, there has been a great increase in the price of labor and of all the materials that enter into road construction since those estimates were made by the State Highway Commission, so that funds which were inadequate when the estimates

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were made are far more so now than they were then. No option is given the supervisors to change the apportionment of the funds, nor to omit any one of the roads from the apportionment. It is sought to place the supervisors in the anomalous position of being compelled to make *designated* improvements for a sum of money far inadequate to accomplish the result required. Such would be the result of the contention of the defendants in error as to the proper construction of the act in question. We are unable to concur in this contention. The language of the act, "the board of supervisors * * * are hereby authorized and empowered" is not equivocal, but is plain and unambiguous, and the circumstances of the case do not disclose any duty resting upon the board to exercise the power conferred. They were given a discretion in the matter, which they exercised when they refused to issue the bonds, and the circuit court was without jurisdiction to set aside or annul their action. For these reasons the judgment of the circuit court must be reversed.

Reversed.

Syllabus.

Richmond

BOARD OF SUPERVISORS OF CULPEPER COUNTY v. COONS
(No. 1).

COONS v. BOARD OF SUPERVISORS OF CULPEPER COUNTY
(No. 2).

November 15, 1917.

1. **COUNTIES — County Officers — Compensation — Discretion of the Board of Supervisors.**—A board of supervisors may not withhold action fixing the amount of, or what is the same thing in effect, place a condition or conditions upon the payment of the salary or compensation allowed by law to an officer whose office or position is not created by the board of supervisors but by law. Such an office or position is not the creature of the board of supervisors but of the law. By the law, therefore, and not by the board of supervisors, except as they may act in accordance with the law, must the salary or compensation of such office or position be fixed. For any failure of such an officer to discharge his duties which are prescribed by law, the remedy of mandamus will lie. To allow boards of supervisors to withhold any action aforesaid, or to place a condition or conditions upon the payment of the salary or compensation aforesaid, would be to allow such boards to nullify the election of the officer to the extent of the emoluments of the office allowed by law thus denied him.
2. **CLERKS OF COURT—Discretion of Board of Supervisors in Fixing Compensation.**—The board of supervisors of a county has no discretion to refuse to act in fixing the compensation and other allowances of a county clerk allowed by law at something, within the limits prescribed by statute; nor, if it acts, to impose a condition or conditions upon the payment of such compensation, on the ground that the clerk has not performed, or is not performing his duties as such.
3. **COUNTIES—County Officers—Discretion of Board of Supervisors—Time of Payment of Salary.**—A board of supervisors undoubtedly has a discretion as to fixing the time or times of payment of salaries and allowances of county officers, if exercised for good and sufficient cause—such as the condition of the county

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treasury in the lack of funds to pay same at a certain time or times in the year, because of some situation against which the board did not and could not reasonably have been expected to provide in the next preceding laying of the county levy, or the like cause, operating impersonally. The board of supervisors of a county has no discretion to fix a different time of payment of the annual salary and other allowances provided for by law of a county clerk from the times of payment of salaries and allowances of other county officers allowed by law, on the ground that the clerk is not discharging or has not discharged his duty as such.

4. COUNTY OFFICERS—*Interest on Back Salary and Allowances*.—An obligation of a county of the State to a clerk for the unpaid amount of allowances made him by order of the board of supervisors, bears no interest.
5. CLERKS OF COURT—*Extra Compensation for Current General Index*.—The extra allowance allowed in section 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, p. 772, to a clerk of court or other suitable person for preparing a general index to the deed books, will books, etc., in the clerk's office, applies only to some person, not necessarily the clerk, specially appointed by the court to make the general index mentioned in the statute, and does not apply to the current general indexing subsequent to the order of the court making such appointment. In the instant case it was the duty of the clerk to do the current general indexing and he was not entitled to any extra compensation therefor other than his salary as county clerk. An order of court allowing such extra compensation would be without authority of law, and the board of supervisors would have no authority thereunder to "direct warrant therefor" or otherwise authorize such payment out of the county treasury.
6. CLERKS OF COURT—*Duty as to Indexing*.—An order was entered under section 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, page 772, by which the clerk was appointed to make the general index to the deed books, will books, etc., in the clerk's office. Prior to such order there was in use in the county a general index system which was not ledgerized. Acting under the order, the clerk began the general indexing and adopted a ledgerized system known as the "Coons' Index System." The clerk also subsequent to the order indexed all deeds, wills, etc., according to the "Coons' Index System" and continued this current indexing until the county failed to provide him with the "Coons' Index System" and the necessary index

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books for the work of current general indexing, when he returned to the old general index system, subject to some improvements.

Held: That the clerk was, under the circumstances, justified in returning to the old system of general indexing, and that in doing such indexing in accordance therewith he complied with his duty as prescribed by statute; and that it would not be his duty to general index the accumulated records in some general index system which might thereafter be provided and installed in the clerk's office.

7. **CLERKS OF COURT—Records—General Index System.**—Action of the circuit court adopting a general index system was, under the statute formerly existing on the subject, and is now under the statute at present existing on the subject, a condition precedent to the ascertainment of what general index system, if any, other than that previously in use, it is the duty of a county clerk to use at any given time in current general indexing the records of his office.
8. **CLERKS OF COURT—Fee for Recording Deed to County.**—A county clerk is entitled to the fee allowed by section 3505, Code of 1904, for recording a deed to the county, notwithstanding a general allowance to the clerk for road services.

Original application for mandamus.

Mandamus denied in Cause No. 1.

Mandamus awarded in part as prayed for in Cause No. 2.

STATEMENT OF THE CASE AND FACTS.

The plaintiffs in these causes invoke the exercise by this court of its original jurisdiction to award writs of mandamus.

Omitting reference to certain matters which have been eliminated from controversy since these causes were instituted, the following statement will sufficiently set forth the relief now being sought herein.

The first above entitled cause (hereinafter referred to as cause No. 1) seeks such writ to compel the defendant

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therein, the clerk of Culpeper county (hereinafter referred to as clerk), to general index certain records in his office in accordance with a certain ledgerized system of general indexing, which will be hereinafter more particularly described, during a period in which the necessary index books for such work were not and have not yet been provided by the county.

The second above entitled cause (hereinafter referred to as Cause No. 2) seeks such writ to compel the defendant therein, the board of supervisors of Culpeper county (hereinafter referred to as the board), to issue warrants to said clerk for the unpaid balance of the annual allowances for the year 1917 made to him by said board, consisting of his salary as clerk of \$600.00, for road services \$50.00, as clerk of said board \$60.00 and for stationery \$150.00, being a total of \$860.00, less \$215.00 heretofore paid on account thereof, being a net unpaid balance of \$645.00, on \$215.00 of which interest is claimed from July 1, 1917, and on another \$215.00 interest is claimed from October 1, 1917, and the residue is claimed as due and payable on December 31, 1917, should said clerk continue in his position as clerk until the latter date.

Mandamus is also sought in Cause No. 2 to compel said board to issue warrant to said clerk for \$815.00, with interest thereon from August 29, 1914, for general indexing certain current records in his office in accordance with said ledgerized system during a period in which such system had not been expressly adopted by any order of the circuit court for said county, but prior to and during which it had been and was put in use and used by said clerk acting under an order of court presently to be referred to and for which work the necessary index books were provided by the county.

Mandamus is also sought in Cause No. 2 to compel said board to issue warrant to said clerk for \$1.25 clerk's fee

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provided by statute for recordation of deeds claimed by him for recording a certain deed from J. W. Jasper and wife to said county, conveying to it a right of way for a public road.

THE FACTS.

The said clerk was duly elected and qualified as county clerk and as such clerk of the Circuit Court for Culpeper county (Va. Const., sec. 110) on July 1, 1893, and has continued, by successive elections and qualifications, as such clerk up to the present time. His current term of office will not expire until December 31, 1919, his last election having occurred in November, 1911, his current term of office of eight years having commenced thereunder on January 1, 1912.

The said county clerk was and is *ex officio* clerk of the said board. (Sec. 849, Code of Va.)

Acting under statutory authority, the said board has been accustomed on or about the first Monday in January of each year, since said clerk has been the incumbent of said offices as aforesaid, to fix the salary and stationery allowances of said clerk for the current year, and to make the same payable in four equal quarterly instalments, to-wit, one-fourth on or about March 31st, the same amount on or about June 30th, the same amount on or about September 30th, and the residue on or about December 31st of the year—the same course being taken as to the salaries of the other county officers. Such custom of fixing of the annual allowances and payment of same quarterly as aforesaid was followed by said board during said incumbency of said clerk each year until the year 1917. For the years 1915 and 1916 said board in January fixed the annual allowances of said clerk as aforesaid, at the same time it fixed the allowances of the other county officers, at the following amounts, namely:

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Clerk	\$600.00
Road services	50.00
Clerk board of supervisors	60.00
Stationery	150.00

or total for each such years of\$860.00,
and these allowances were paid quarterly as aforesaid,
\$215 each quarter, by warrants issued therefor as afore-
said.

In January, 1917, when the annual allowances of the other county officers were fixed by said board and ordered paid as usual, it did not fix any allowances for said clerk, but in reference thereto entered the following in the minutes of the proceedings of the board: "W. E. Coons salary laid over."

On March 19, 1917, the said board entered the following order:

"In re salary of W. E. Coons, clerk, for year 1917.

"On motion, W. E. Coons, clerk, is allowed \$215.00, said amount to be deducted from his salary when same is fixed."

On August 31, 1917, said board entered an order fixing the allowance of said clerk for the year 1917 at the same amount of same items as in 1915 and 1916 and the same total of \$860.00, but added a *proviso*, in effect, that these allowances should not be paid until the said clerk should do the general indexing aforesaid, to compel the doing of which mandamus is sought in said cause No. 1, as above set forth.

The material facts in regard to said general indexing of old records, and also in regard to the current general indexing covered by the \$835.00 claim of said clerk above referred to, are as follows:

In March, 1894, the year after the commencement of the first term of office of said clerk, the Circuit Court of Culpeper county entered an order under section 3184 of the

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Code of Virginia, as amended by Acts of Assembly 1891-2, p. 772, by which the said clerk was selected as being in the discretion of such court a suitable person and was appointed to make a general index to certain of the deed books, will books, and judgment lien docket books of the clerk's office of said county in accordance with such statutes. (No copy of this order is in the record of the causes before us. The above indicates the contents of such order of court as definitely as same is disclosed by the pleadings, admissions of the briefs and statements of facts before us. It must be further assumed, however, that such order provided for extra compensation to said clerk for general indexing only the said books *then existing* in said clerk's office, containing deeds, wills theretofore recorded, and judgments theretofore docketed, since the statute last above referred to authorized such compensation for indexing such books only, as will be more particularly pointed out in the opinion below.)

Prior to such order there was in use in said county a general index system which was not ledgerized, all the names indexed which began with the letter A being found under the letter A, similarly as to letter B, etc., and such general index from long use had become defaced.

Acting under said order of court, said clerk began in May, 1894, general indexing, and he adopted as the system therefor a ledgerized system known as the "Coon's Index System" for which said clerk subsequently obtained a United States patent, which has ever since and now belongs to, and the system of indexing court records thereunder has been ever since and is now controlled by, said clerk in his personal and individual capacity.

Under this system, books printed in advance of some clerical preparation of their contents cannot be utilized. They are not stock books and cannot be bought as such. Before a book can be printed, the data printed therein, in-

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cluding names, etc., must be compiled and the greater part of the indexing work done. It, therefore, manifestly requires more work of a clerk to general-index under such system than under the said old general index system, or under the ordinary ledgerized systems in use in some other clerk's offices. The record in the causes Nos. 1 and 2 before us does not disclose all of the general indexing which was done by said clerk of books in said clerk's office existing at the time said order of court was entered. It is sufficient to say as to this, however, that said clerk was paid in full for all of such work done by him.

But, in addition to the work of general indexing books in said clerk's office existing at the time of said court order, said clerk, after May, 1894, indexed all deeds and wills recorded and judgments docketed in said clerk's office after March, 1894 (which work will be hereinafter referred to as current general indexing), and continued this current general indexing up to December 23, 1913, in the general index in accordance with said "Coon's Index System." During this time the necessary index books for such current general indexing were paid for by said county and furnished for such work. Bills for such books were from time to time rendered by the printing concerns, who furnished same as directed by said clerk, against the latter as clerk, and on being presented to the said board were ordered paid and were paid accordingly.

During such period (from March, 1894, to December 23, 1913) certain accounts were rendered from time to time by said clerk and presented to the said circuit court for work done in the general indexing aforesaid, some of which accounts included charges for current general indexing of deeds and wills recorded and judgments docketed after March, 1894. These accounts so far as rendered up to and including an account rendered November 19, 1906, were all allowed by said court, ordered paid and were allowed

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by said board and were paid by the county accordingly. Following November 19, 1906, the said clerk proceeded with the current general indexing aforesaid expecting to be paid therefor in like manner as he was paid for general indexing of said books existing in said office at and prior to said court order of March, 1894, and as he was in fact paid for some of the work of current general indexing as aforesaid. The necessary index books were furnished and paid for by the county up to December 23, 1913, as aforesaid. The work of current general indexing such books from November 19, 1906, to December 23, 1913, for which he has not been paid, aggregates the said sum of \$835.00.

On or about February, 1913, the said board was advised by the attorney for the Commonwealth of said county that it had no legal right or authority to make an allowance to the said clerk of anything for current general indexing said records; that it was the duty of the clerk, under the statute law on the subject, to do such current indexing without extra compensation; and subsequently (precisely when a decided and final position on the question was taken by the board does not appear from the record before us, but certainly on or before December 23, 1913) the board so informed said clerk and notified him that it would not in future make him any allowance for such current general indexing in addition to his salary as clerk. The board did not decline to continue to pay for the printing and furnishing of the necessary index books for such current indexing work. But thereupon said clerk ceased to prepare data for the current general indexing in and refused to sell to the county the necessary index books therefor of said "Coons' Index System" after December 23, 1913, at a price on which he and the said board could agree.

Thereupon, said clerk returned to the old system of general indexing in use in said county prior to March, 1894 (with some added improved features not material to the

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controversies before us), and has since December 23, 1913, kept up the current general indexing of his office by the use of such old system (with the added improvements alluded to above) and has continued to refuse to sell to the county the "Coons' Index System" therefor at any price to which the said board and he could agree.

Accordingly, since December 23, 1913, the said county has been without any index books for any ledgerized system of current general indexing and without any such system being in use.

Further, in regard especially to the said \$835.00 claim of said clerk, the following facts should be noted:

On February 23, 1913, the attorney for the Commonwealth and the said clerk orally submitted to the then judge of the Circuit Court for Culpeper county for his opinion the question whether the said clerk was entitled, in addition to his salary as clerk, to the compensation covered by his account for said \$835.00 for the current general indexing aforesaid. Such judge then gave it as his opinion that the clerk was not entitled to such extra compensation. Subsequently this matter was pressed by and for said clerk with such judge on a number of occasions, and he always and invariably told the said clerk and other parties that he could not enter an order in said circuit court for the payment for such work, and such judge wrote a letter to the wife of said clerk on May 5, 1914, to such effect.

There appears, however, on record on the order book of said circuit court, of date August 29, 1914, the following order (so far as material):

"An account of W. E. Coons, clerk, for indexing amounting to \$835.00 was examined, allowed and ordered to be certified to the board of supervisors for payment. For indexing deed book No. 27, grantee side, \$20 * * *" etc. (giving items of indexing covered by the account, ag-

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gregating \$835.00, all of which were for current general indexing aforesaid up to December 23, 1913). On the margin of the order book recording this order was written by such judge and signed by him, after the adjournment of the August term of such court, 1914, the following entry "Entered by mistake."

In regard to the \$1.25 clerk's fee for recording the deed from Jasper and wife to the county of Culpeper, conveying a right of way for a public road, above mentioned:

The statute provides such fee to the clerk for recordation of all deeds. The record does not disclose that the allowance to the clerk for road services was intended to cover such a service as recording such a deed as this.

SUMMARY OF FACTS.

1. With respect to the discretion as to the amounts of the allowances to the clerk vested by statute in said board: That discretion has been exercised by the board. These amounts were made definite and certain by the order of such board of August 31, 1917. What the board has done, however, is to place a condition upon the payment of such allowances, namely, in effect, the requirement that if the said clerk shall sell his "Coons' Index System" to the county at a price which he and the said board can agree upon, he shall do the general indexing of the records aforesaid which have accumulated in his office since December 23, 1913, in the "Coons' Index System," otherwise that he shall do such general indexing in some other ledgerized general index system *hereafter* to be chosen and installed by the said board in said clerk's office, without compensation for such work other than his salary as county clerk.

2. If the statute law on the subject did not authorize payment of extra compensation to the clerk for said cur-

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rent general indexing, in addition to his salary, there was no contract express or implied, in fact or in law, between said clerk and said board or county, on the subject of such extra compensation.

3. The contract between the said clerk and said board or county with respect to the furnishing by the former of his said index system to the county was not an express but an implied contract and it expired certainly on or before December 23, 1913; the county on and after that date being free to discontinue the use of the "Coons' Index System" and the owner of the latter being on and after such date free to decline to sell its use to the county.

4. That the order of court of March, 1894, above referred to, did not expressly adopt the "Coons' Index System," but by the wide authority given thereby to said clerk in the premises and the subsequent action of such court in allowing claims of such clerk for general indexing of records in said clerk's office existing at the time of the first named order (March, 1894) in the "Coons' Index System," it must be now inferred and taken to be a fact that said court in effect adopted said "Coons' Index System" as the system for general indexing the records of said county existing in March, 1894; but the court did not by any order prescribe how long that system should be continued, nor make any contract with the owner of such system by which the county was bound to continue to use such system or to purchase the index books therefor or by which such owner would be obligated to continue to furnish such books, for any definite time, certainly not beyond December 23, 1913; nor did the said board do so.

5. Since December 23, 1913, there has been no ledgerized general index system in use in the clerk's office of said county.

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6. That the only general index system in use in such county since December 23, 1913, was the old general index system in use therein prior to March, 1894. That this old system, so far as the record before us discloses, gives the Christian names or initials of the Christian names, as well as the surnames of the grantors, grantees, testators and judgment lien creditors and debtors of the deeds, wills and judgments recorded and docketed, and hence complied with the statute (Acts 1891-2, p. 772) on the subject, in lieu of a different system being prescribed by the court under Acts 1912, p. 575. That the order of court of March, 1894, did not prescribe the "Coons' Index System" or any other particular system, leaving the system to the discretion of said clerk.

7. That the record does not disclose that the allowance to the clerk for road services aforesaid was intended to cover such a service as the recordation of such a deed as that from Jasper and wife.

Edwin H. Gibson, for board of supervisors of Culpeper county.

Hidden & Bickers and Gilmer & Stant, for W. E. Coons.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

In our view of these causes the following decisive questions arise therein, which we will consider and pass upon in their order as stated below.

1. Has the board of supervisors of a county any discretion to refuse to act in fixing the compensation and other allowances of a county clerk allowed by law *at something*, within the limits prescribed by statute; or if it acts,

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to impose a condition or conditions upon the payment of such compensation, on the ground that the clerk has not performed, or is not performing, his duties as such?

This question must be answered in the negative. *Blair v. Marye, Auditor*, 80 Va. 485. The principle applied in the case just cited is the same as that which is involved in the undertaking by a board of supervisors to withhold any action fixing the amount of, or (what is the same thing in effect) the undertaking by such board to place a condition or conditions upon the payment of the salary or compensation allowed by law to an officer whose office or position is not created by the board of supervisors but by law. Such an office or position is not the creature of the board of supervisors but of the law. By the law, therefore, and not by the board of supervisors, except as they may act in accordance with the law, must the salary or compensation of such office or position be fixed. For any failure of such an officer to discharge his duties which are prescribed by law, the remedy of mandamus will lie. To allow boards of supervisors to withhold any action aforesaid, or to place a condition or conditions upon the payment of the salary or compensation aforesaid, would be to allow such boards to nullify the election of the officer to the extent of the emoluments of the office allowed by law thus denied him.

The discretion in the premises vested by law in the board of supervisors is not to refuse to act, or if they act, not to act arbitrarily, but according to law. They have a discretion, given by statute as aforesaid, as to the amount of the allowances. But that discretion was exercised by the order of August 31, 1917.

A board of supervisors undoubtedly has a discretion also as to fixing the time or times of payment of salaries and allowances of county officers, if exercised for good and suf-

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ficient cause—such as the condition of the county treasury in the lack of funds to pay same at a certain time or times in the year, because of some situation against which the board did not and could not reasonably have been expected to provide in the next preceding laying of the county levy, or the like cause, operating impersonally. For the reasons stated above, however, the board of supervisors of a county has no discretion to fix a different time of payment of the annual salary and other allowances provided for by law of a county clerk from the times of payment of salaries and allowances of other county officers allowed by law, on the ground that the clerk is not discharging or has not discharged his duty as such.

2. Is the said clerk entitled, in the instant causes, to interest on the unpaid amount of the allowances made him by order of said board of August 31, 1917, to-wit, on the instalments thereof of \$215.00 from July 1, 1917, and on \$215.00 from October 1, 1917, until paid?

On this question the cases of *Lynchburg v. Amherst Co.*, 115 Va. 600, 80 S. E. 117, and *Blair v. Marye, Auditor*, 80 Va. 485, are cited by counsel for the clerk, and in that connection it is stated by counsel: "We simply mention what at least appears to be a conflict in the two cases mentioned for whatever it may be worth to the court." On this subject we deem it sufficient to say that we do not consider that there is any conflict between the two cases referred to, and that it is settled by the case of *Lynchburg v. Amherst Co.*, *supra*, that the obligations of the counties of the State of the character in question bear no interest.

3. What is the true construction of the statute law of the State on the subject of the allowance to a clerk of extra compensation, in addition to his salary as clerk, for current general indexing, *i. e.*, the general indexing of the deed, will and judgment lien docket books according to a general

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index system adopted prior to or in use in the county at the time of such current general indexing—so far as brought in question in the instant causes?

This question can best be answered by having before us the statute law on the subject. The statute under which the questions involved in the instant causes all arose was enacted February 29, 1892, is contained in Acts of Assembly 1891-2, p. 772, and, so far as material, is as follows:

Section 3184. "The court of every county * * * wherein a general index to the deed books, will books * * * judgment lien docket books * * * in the clerk's office of such county * * * has not been provided or wherein such general index has been provided and has become so defaced as to render another general index necessary or proper, or wherein the index does not show the Christian names or the initials of the grantor, grantee, or testator, may, in its discretion, appoint a suitable person, whose duty it shall be to make a general index to such deed books in the full names of the grantor and grantee, and a general index to the will books * * * judgment lien docket books * * *; and the said court shall certify a proper allowance to the person so appointed as compensation for services performed under such order, and direct warrant therefor payable out of the treasury of such county * * * and the board of supervisors of the county * * * shall make sufficient levy for same. It shall be the duty of the clerk of every court * * * to index all recorded deeds, wills, * * * docketed judgments * * * as well as in the general index as in the deed books, will books * * * judgment lien docket books * * *" ("as" italicized above is evidently redundant, due to an error in draft of act or in printing. This word is absent in section 3184 of Code of 1887 which this act amends.)

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This statute did not in terms go beyond providing for a general index containing the Christian names or initials of the persons indexed, in lieu of no general index, or of one defaced so as to render another necessary and proper, or of one which did not show the Christian names or initials of the persons indexed. This was the extent of the improvement in general indexing then contemplated by statute or for which compensation was expressly authorized thereby to be paid. But however that may be, the payment authorized by the statute is to some person, not necessarily the clerk, specially appointed by the court to make the general index mentioned in the statute. That general index did not include books of deeds, wills and judgments recorded and docketed subsequently to the order of court making such appointment. That is made clear by the closing provision of the statute that, "*It shall be the duty of the clerk of every county * * * to index all recorded deeds, wills * * * docketed judgments * * * in the general index * * **" where one has been provided. (Italics supplied.) Therefore, if we consider the "Coons' Index System" as the system of general indexing adopted and in use in said county from 1894 to December 23, 1913, it was the duty of said clerk to do the current general indexing from March, 1894, in the "Coons' Index System" up to December 23, 1913, without being entitled to any extra compensation therefor other than his salary as county clerk.

It was not until the act approved March 14, 1912, was passed (Acts, 1912, p. 575), that statutory provision was made for further improvement in general indexing, consisting in the advance from a general index giving Christian names or initials of the names indexed, to a legerized system of general indexing, which latter system results in many subdivisions of names which fall together under

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their alphabetical division under the old system contemplated and provided for by said act of February 29, 1892.

The act approved March 14, 1912, so far as material, is as follows:

"Chapter 283. An act to provide for the indexing of deeds and other records in ledgerized general index books. 1
* * * That the judges of the circuit * * * courts of this Commonwealth, either in term time or in vacation, be, and they are hereby empowered in their discretion to employ a suitable and efficient person or persons for the purpose and have the deed books, judgment lien docket books * * * wills, * * * indexed in ledgerized general index books in such ledgerized general index system as the said courts may deem expedient, and in their opinion affording as good public service as that contained in and afforded by the said ledgerized general index Key System. And for said work the said courts shall have the power to allow a reasonable compensation to be paid out of the county * * * treasury of the county * * * for which said work is done.

"2. Said indexing may be in addition to or in lieu of the indexes now required to be kept under section thirty-one hundred and eighty-four of the Code of nineteen hundred and four, as said courts may in their discretion determine.

"3. The board of supervisors of the county * * * wherein said ledgerized indexing shall be directed by the court to be done, shall provide in laying its annual county * * * levy a sufficient sum to pay for said indexing, together with the costs of the necessary index books and stationery that may be required therefor."

There was no action taken or purporting to have been taken by the Circuit Court for Culpeper county under the last named statute.

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The last named act was repealed by a still later act, approved March 16, 1916 (Acts, 1916, p. 394), which made provision for a yet further advance in the system of general indexing of records. The last named statute is, so far as material, as follows:

"1. That whenever the attention of the judge of any circuit court of any county * * * is called to the need of an improved system of general indexing to any of the records kept by the clerk of such court, it should be the duty of such judge in his discretion, to appoint a committee to inquire into the necessity for such indexing and make a report to said court, which report may be made and filed either in term or in vacation.

"2. If such committee shall report that the work is needed, it shall be the duty of said judge, in his discretion, in term or in vacation, to authorize and direct said committee to make a written contract with some responsible and experienced person or persons for the installing of said work.

"The committee so appointed, subject to the approval of the court, shall contract for a modern family name, or ledgerized, alphabetical, key-table index, which shall show such information, in addition to name, as said committee may agree upon.

"3. Where such index is installed, the same plan of index to current records shall be adopted and used by the clerk of such courts, and they shall enter daily thereon all instruments admitted to record. The clerks keeping such current index shall not be required to keep a 'daily index of receipt of deeds for recordation' or an individual index to each book, as provided in section twenty-five hundred and five of Pollard's Code.

"4. The board of supervisors of the county *herein* (wherein) said indexing shall be directed by the court to

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be done, shall, if necessary, provide, in laying its annual county * * * levy, a sufficient sum to pay for said indexing and materials.

"5. Chapter two hundred and eighty-three of the acts of the General Assembly of nineteen hundred and twelve is hereby repealed."

No action of said clerk or of said court or board involved in the instant cause was, or could have been taken under the last named act, which was not enacted until March 14, 1916, as aforesaid, and did not go into effect until ninety days later, but its provisions are quoted to show the progressive advance in the statute law on the subject of general indexing to meet modern growing demands arising from the general appreciation of the value of the improvements which have been devised in such indexing.

It is apparent, therefore, that, in truth, the said clerk, in his action under the order of court of March, 1894, was a pioneer in the improvement of general indexing of records and was in advance of the statute law in Virginia on the subject. The work the said clerk thus did in general indexing the records existing in his office in March, 1894, and the current records thereafter accumulated was in advance and in excess of what the statute on the subject then contemplated, to the extent that he *ledgerized* such general indexing, in addition to having it show the Christian names or initials of the names indexed. However, only the current indexing covered by said account for \$835 is involved in the causes before us. For current general indexing the statute then in force (of February 29, 1892) certainly, as above noted, allowed no extra compensation to be paid to the clerk.

Therefore, the said court, in refusing to allow said account of the clerk for said \$835 covering current general indexing as aforesaid, if it did so refuse, acted in accord-

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ance with the statute under which said work was done, in that such statute did not authorize such extra compensation. The fact that said court by other orders entered at prior times allowed and said board approved the payment of similar claims by the clerk is immaterial, for reasons which are obvious.

If, however, the said court did not refuse but attempted to allow said \$835 claim, and if the order appearing on the order book of said court of date August 29, 1914, should be considered as an order of such court, the claim is as yet unpaid, the order is still executory, and it was without authority of law; and the said board (whose powers as to allowances of claims are wholly statutory) had no authority thereunder to "direct warrant therefor" or to otherwise authorize such payment out of the county treasury. *Price, Auditor v. Smith*, 93 Va. 14, 24 S. E. 474; *Richmond City v. Epps, Sergeant*, 98 Va. 233, 35 S. E. 723. Hence the said board was but acting in accordance with law in refusing to allow such payment.

It becomes unnecessary, therefore, to consider the questions raised in these causes as to how such orders came to be entered, or the effect of the entry aforesaid on the margin of the order book that the order was "entered by mistake," etc.

4. Is it the duty of said clerk to general index the current recorded deed, will and judgment lien docket books in his office aforesaid, which accumulated during the period from December 23, 1913, onward, in some general index system which may hereafter be provided and installed in such office, other than the general index system in which said clerk has recorded such current records during such period?

From what has been said above touching the facts and

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the statute law on the subject, it is apparent that such duty does not exist.

As above noted the "Coons' Index System" was not in force or in use in said county later than December 23, 1913. The said clerk complied with the requirements of said statute (Act of February 29, 1892) by doing the current general indexing in such system so long as it was in force in such county, to-wit to December 23, 1913. In doing so, as above noted, he did nothing more than his statutory duty, and hence he was entitled to no extra compensation therefor. At the same time, he did nothing less than his duty as clerk up to that time. Therefore, by reason of the failure of the county, whether through the said circuit court or said board or otherwise, to provide the "Coons' Index System" to the said clerk as such, or the necessary index books for the work of current general indexing therein, thereafter the existence of such index system in said clerk's office ceased to continue, and said county was without such system for the general indexing of any records in its clerk's office accumulating after December 23, 1913.

It is needless for us to inquire by whose fault this deplorable condition was induced. In these causes, being proceedings for mandamus, we are powerless to enforce any remedy in the premises; if indeed any remedy exists. We are confined to a consideration of the facts as they exist and to the inquiry as to whether any rights of the parties arise under the law as applicable thereto which are enforceable by mandamus.

The "Coons' Index System" not being in use or available for use in said county after December 23, 1913, it was not the duty of said clerk to do the current general indexing therein. In that dilemma the said clerk returned to the old general index system in use in his office prior to

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March, 1894, subject to some improvements thereon above alluded to. He thereafter, until these causes were instituted, did the current general indexing by such system. Such system met the requirements of the statute law on the subject prior to the act of March 14, 1912. Action of the circuit court adopting a general index system was, under the statute formerly existing on the subject, and is now under the statute at present existing on the subject, a condition precedent to the ascertainment of what general index system, if any, other than that previously in use, it is the duty of a county clerk to use at any given time in current general indexing the records of his office. As above noted, the said circuit court did not adopt the "Coons' Index System" for any definite period of time, nor did the said county, through said court or said board or otherwise, make any contract for the use of such system, or for the necessary index books therefor, beyond December 23, 1913. No other system of general indexing was adopted by said court thereafter, either under the act of February 29, 1892, or of March 14, 1912, in lieu of the old system aforesaid in force prior to any order of court on the subject. We think, therefore, that said clerk was, under the circumstances, justified in returning to such old system of general indexing of the current records after December 23, 1913, and that in doing such indexing in accordance therewith he has complied with his duty in that behalf as prescribed by statute.

The question 4 under consideration must therefore be answered in the negative.

5. Is a board of supervisors authorized by law to allow to the county clerk for recording a deed to the county the fee allowed by section 3505 of the Code of Virginia to be charged by clerks for recording deeds, in addition to the allowance of \$50 made to such clerk for road services?

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No question is raised before us in these causes as to the authority of said board to make the allowance which it has made as aforesaid to said clerk for road services, in addition to the \$600 annual allowance as salary as clerk of the county (Sec. 834, Code of Va. as amended), and \$60 for salary as clerk of said board (Sec. 852, Code of Va., as amended), and \$150 for stationery (Sec. 846, Code of Va.), hence authority therefor by statute law must be presumed by us to exist so far as these causes are concerned. If such authority exists, the presumption is that such allowance was made to cover services for which no specific compensation is provided by statute. The record before us does not disclose that said compensation for road services was made to cover such fees as said recordation fee, and, therefore, we must conclude that it was improperly disallowed by said board.

For the foregoing reasons, we are of opinion to award the writ of mandamus prayed for by said clerk in cause No. 2, to compel the board of supervisors of Culpeper county to forthwith issue a warrant in favor of said clerk for said \$1.25 recordation fee and also for \$430 in his favor for the allowances made him by order of said board as above stated for services, etc., to October 1, 1917, and that on or about December 31, 1917, such board shall issue to said clerk a warrant for \$215, the remainder of such allowances, should such clerk continue to fill his said office to the latter date; such warrants to be payable by the treasurer of the county out of the county funds available for that purpose, without interest. We are of opinion to deny all further relief by writ of mandamus prayed for by said clerk in cause No. 2, and to deny the writ of mandamus prayed for by said board of supervisors in cause No. 1. The order of this court will be entered accordingly,

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with costs in favor of said clerk as the party substantially prevailing.

Mandamus denied in Cause No. 1.

*Mandamus awarded in part as prayed
for in Cause No. 2.*

CRIMINAL CASES.

Staunton.

MARTIN V. COMMONWEALTH.

September 20, 1917.

1. PHYSICIANS AND SURGEONS—*Prosecution for Practicing Without Having Procured a Certificate.*—Accused, at the time of the prosecution, was a non-itinerant optician engaged in the practice of optometry, and had been so employed since the year 1884. He had the following display letters on the front door and windows of his place of business: "Dr. J. Harry Martin, Incorporated, Eyes Exclusively," and "Dr. J. Harry Martin, Incorporated, Optometrist." It did not appear that accused had ever practiced or offered to practice medicine or surgery either in the city of Roanoke or elsewhere.

Held: The accused was exempt from prosecution under chapter 84, section 12, Acts 1916, pages 138, 147, as the accused was included in the exemption of section 11, of "any non-itinerant person or manufacturer who mechanically fits or sells lenses, artificial eyes, * * * or is engaged in the mechanical examination of eyes for the purpose of adjusting spectacles, eyeglasses or lenses; * * *."

Error to a judgment of the Corporation Court of the city of Roanoke.

Reversed.

The opinion states the case.

Hairston, Hairston & Woodrum, for the plaintiff in error.

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Attorney-General Jno. Garland Pollard and Assistant Attorney-General Leslie C. Garnett, for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

Martin brings error to a judgment of conviction for practicing medicine in the city of Roanoke without first having procured a certificate from the board of medical examiners of Virginia, and sentencing him to pay a fine of \$50.00.

The essential facts are these: Accused was graduated from a Kansas school with the degree of "Doctor of Optometry." On March 5, 1912, he obtained for himself and his associates a charter of incorporation under the name of "Dr. Harry Martin, Incorporated." The principal office of the corporation was located in the city of Roanoke, and its chief business was manufacturing and dealing in optical goods. Accused, at the time of the prosecution, was a non-itinerant optician engaged in the practice of optometry, and had been so employed since the year 1884. He had the following display letters on the front door and windows of his place of business: "Dr. J. Harry Martin, Incorporated, Eyes Exclusively," and "Dr. J. Harry Martin, Incorporated, Optometrist." It did not appear that accused had ever practiced or offered to practice medicine or surgery either in the city of Roanoke or elsewhere.

Upon this evidence the trial court, over the objection of accused, instructed the jury that if they believed from the evidence that he had used the display letters and words indicated above on the door and windows of his shop, then, as a matter of law, he was practicing medicine and was guilty as charged in the indictment.

The prosecution is founded on Ch. 84, section 12, Acts 1916, pp. 138, 147. The parts of section 12 held to be ap-

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plicable to this case read as follows: "Definition of practice of medicine—Any person shall be regarded as practicing medicine within the meaning of this act * * * (2) or who shall use in connection with his name the words or letters "Dr." "Doctor," "Professor," "M. D." or "Healer," or any other title, word, letter or designation intending to imply or designate him as a practitioner of medicine in any of its branches, or of being able to heal, cure, or relieve those who may be suffering from injury or deformity or disease of mind or body. This section shall also apply to corporations."

If, standing alone, the display signs or letters employed by accused can be said to bring him within the condemnation of section 12 (which we need not decide), nevertheless, when that section is read in connection with section 11, it is quite clear that he is not guilty of the offense of which he has been convicted. Under "Exemptions from examinations; exceptions," section 11, after declaring: "Nothing in this act shall be construed to affect commissioned or contract medical officers serving in the United States army, navy or public health and marine hospital service," etc., continues: "or any non-itinerant person or manufacturer who mechanically fits or sells lenses, artificial eyes, * * * or is engaged in the mechanical examination of eyes for the purpose of adjusting spectacles, eyeglasses or lenses; * * *"

Thus, it plainly appears that the business or avocation of accused is included in the foregoing exemption or exception, and that he was not amenable to this prosecution. We may also direct attention to Acts 1916, Ch. 148, p. 251, which defines and regulates the practice of optometry, and makes provision for the establishment of a board of examiners in optometry, etc.

For these reasons, the judgment of the Corporation

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Court of the city of Roanoke must be reversed, and the case remanded for further proceedings.

Reversed.

This case is not distinguishable in principle from the case of *J. Harry Martin v. Commonwealth*, 93 S. E. 623, in which an opinion has been handed down at the present term. And for the reasons stated therein, the judgment in this case must also be reversed, and the case remanded for further proceedings.

Reversed.

Syllabus.

Staunton.

PINE AND SCOTT V. COMMONWEALTH.

September 20, 1917.

1. CRIMINAL LAW—*Indictment and Information—Constitutionality of Statute—Appeal and Error—Point Raised for the First Time on Appeal.*—Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, plea, motion or otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time.
2. CONSTITUTIONAL LAW—*Construction—Expressio Unius—Exclusio Alterius.*—The maxim, *expressio unius est exclusio alterius*, though often of importance and value, is not of universal application, even in the interpretation of State Constitutions. They are the fundamental, permanent law of the land, providing for the future as well as the present, and should carry out the principles of government as gathered from the instrument when read as a whole. The application of arbitrary rules of construction will be resorted to with hesitation, especially when it would bring about results contrary to the declared public policy of the State, and hamper the legislature in amply providing for the health, morals, safety and welfare of the people. Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the State, will be considered as prohibiting the powers of the legislature. The principle of the maxim should be applied with great caution to those provisions of the Constitution which relate to the legislative department, and the exclusion should not be made unless it appears to be a plainly necessary result of the language used.

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3. **CONSTITUTIONAL LAW—Construction—Constitution not a Grant of Power, but a Restriction upon the Power of the Legislature.**—In determining whether an act of the legislature is forbidden by the State Constitution, it must be borne in mind that the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it has been taken away; that the legislature is practically *omnipotent* in the matter of legislation, except in so far as it is restrained by the Constitution, expressly or by plain, or (as some of the cases express it) by necessary, implication.
4. **CONSTITUTIONAL LAW—Construction—Presumption in Favor of Act.**—The mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a co-ordinate department of the government; every act is presumed to be constitutional until the contrary is made plainly to appear, and all doubts on the subject are to be solved in favor of its validity.
5. **INTOXICATING LIQUORS—Constitutional Law—Power of Legislature as to Regulations in Regard to Intoxicating Liquors.**—In this State, from the earliest date to the adoption of the present Constitution, the legislature has exercised uncontrolled power over the manufacture and sale of intoxicating liquors, and since local option and dispensary laws have come into vogue, has exercised undisputed authority and control over these subjects also, and it would require very plain language in a constitutional provision to indicate that it was the purpose of the constitutional convention to take away from the legislature a power exercised by the legislatures of the other States of the Union, and one that has been within the province of the legislature of this State from the earliest date.
6. **CONSTITUTIONAL LAW—Classification of Constitutional Provisions—Mandatory, Prohibitive and Permissive or Declaratory.**—The constitutional provisions relating to the legislative department have been classified as mandatory and prohibitive. The oaths of the legislators bind them to the performance of the one, and the courts restrain them from the performance of the other, if they should overstep the limits set. As to all other powers they are free to act as their judgments dictate. In the main this classification is correct, but Constitutions sometimes contain other provisions relating to or affecting the legislative department, which may be classified as either permissive or declaratory.

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7. **CONSTITUTIONAL LAW—Classification of Constitutional Provisions—Mandatory, Prohibitive and Permissive or Declaratory.**—When the Constitution has fully dealt with a subject and covered the entire ground, the legislature would be powerless to make any change in it, unless specially authorized to do so, and it may be desirable to confer such authority. In such case the authority is conferred by a permissive grant in the Constitution. In other cases the constitutional provision is only declaratory of the existing law, and there may or may not be annexed to it a prohibitory provision.
8. **CONSTITUTIONAL LAW — Construction — Presumption as to the Meaning of Words and Phrases.**—The presumption is that the same meaning attaches to a given word or phrase which is repeated in a Constitution, unless the contrary is made to appear, and hence the whole instrument should be examined to ascertain what that meaning is.
9. **INTOXICATING LIQUORS—Constitutional Law—Construction of Section 62, Constitution of 1902.**—By section 62, of the Constitution of 1902, it is provided that: "The General Assembly shall have full power to enact local option or dispensary laws, or any other laws, controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors." This section does not authorize the enactment of a single law the legislature might not have enacted if the section had not been adopted. It is simply declaratory of the existing law, but thereby inviting attention to the subject. Complete authority over the whole subject of intoxicating liquors has not been taken away from the legislature by an express provision, nor by necessary implication, and the maxim *expressio unius est exclusio alterius* does not apply.
10. **CONSTITUTIONAL LAW—Construction—Expediency—Mapp Act.**—The Supreme Court of Appeals is of opinion that the purpose of the act is a wise one, but even if it were of a different opinion, it could make no difference in the result so long as it is within the legislative power, for judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed.
11. **CONSTITUTIONAL LAW—Mapp Act—Section 62, Constitution of 1902.**—The provisions of the act of Assembly approved March 10, 1916 (Acts 1916, page 215), commonly known as the prohibition act, so far as called in question in this case, are not forbidden by section 62 of the Constitution of this State.
12. **INTOXICATING LIQUORS—Indictment and Information—Charging More than One Offense in a Single Count.**—Section 7, Acts 1916, page 215, prescribing a form of indictment under the prohibi-

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tion act, which shall be sufficient, in effect declares that more than one offense arising under the statute may be charged in a single count. The power of the legislature to change rules of procedure is unquestionable, except as restrained by the Constitution, and there is no good reason why it may not provide that what has heretofore required several counts in an indictment may now be accomplished by a single count, provided the prisoner is not unlawfully prejudiced thereby. If the prisoner is not prejudiced, it is a matter of mere procedure and clearly within the province of the legislature. The prisoner is not so prejudiced if he is fully put upon notice of the cause and nature of the offense with which he is charged, and is afforded ample opportunity to make his defense.

13. **INTOXICATING LIQUORS—*Indictment and Information—Charging More than One Offense in a Single Count.***—In the absence of statutory regulation, while any number of misdemeanors of the same nature and punishable in the same manner may be charged in the same indictment, there must be a separate count for each offense, and a defendant cannot be convicted of more offenses than there are counts, and it follows that the defendant cannot lawfully be charged with more than one offense in a single count.
14. **INDICTMENT AND INFORMATION—*Requisites and Sufficiency.***—In all cases, civil as well as criminal, a person hailed into court has the right to demand that he be told in plain, intelligible language what is the cause of the complaint against him; and this right, in so far as it relates to crimes, is guaranteed by both the federal and State Constitutions.
15. **INDICTMENT AND INFORMATION—*Requisites and Sufficiency—Cause and Nature of Accusation—Prohibition Act—Sufficiency of Statutory Form.***—An indictment following the statutory form, as set out in section 7 of the prohibition act, Acts 1916, page 215, undertaking to charge the defendant with all of the first offenses under sections 3, 4 and 5 of the act, does not fully inform the defendant "with clearness and certainty" of the "cause and nature of his accusation."
16. **INDICTMENT AND INFORMATION—*Requisites and Sufficiency—Legal Conclusions.***—Ordinarily, the acts done should be charged, in order to give the defendant the necessary information. It is the function of an indictment to charge facts and not legal conclusions.
17. **INDICTMENT AND INFORMATION—*Criminal Law—Constitutional Law—Cause and Nature of Accusation—Waiver of Right.***—While the Constitution guarantees to every man the right to demand "the cause and nature of his accusation," it does not

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prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment or information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand "the cause and nature of his accusation." If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and which he will be held to have waived unless he asserts it.

18. **BILL OF PARTICULARS—*Right to Demand—Civil and Criminal Cases.***—The right to call for, and the duty to furnish, a bill of particulars in civil cases is of frequent application, and is regulated by section 3249 of the Code. The statute confers the right "in any action or motion," and declares how it may be enforced. Apparently, this statute was not intended to apply to a criminal prosecution, but the right is inherent in the trial court in the orderly administration of justice, to prevent wrong and injustice to persons who are presumed to be innocent, and to assure to them their constitutional rights. The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by a bill of particulars; but if the offense is not charged in the indictment, the defect cannot be supplied by a bill of particulars.
19. **INDICTMENT AND INFORMATION—*More Offenses than there are Counts in the Indictment—Election.***—Except in the single case of an indictment under the prohibition law, the law of this State is that there cannot be more offenses than there are counts in the indictment, and, if the Commonwealth offers evidence of more than one, the proper practice is for the defendant to ask the court to compel the Commonwealth to elect for which one it will prosecute.
20. **APPEAL AND ERROR—*Criminal Law—Constitutional Law.***—A denial of a constitutional right is, of itself, reversible error.
21. **INDICTMENT AND INFORMATION—*More than One Offense Charged in Indictment—Compelling Prisoner to go to Trial on All.***—If more than one offense has been charged in the indictment, the prisoner will not be compelled to go to trial on all, where it is made to appear that they are so separated by time and circumstance that it would confuse and disconcert him in preparation for the trial, or the jury in consideration of the case.
22. **INDICTMENT AND INFORMATION—*More than One Offense Charged in a Count—Remedy.***—Each count, in theory at least, is for a separate and distinct offense, while, in fact, it may be but one offense so charged as to meet the different phases of the evi-

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dence as it may appear on the trial. It would seem, therefore, that the objection to the charge of more than one offense in the same indictment cannot, as a rule, be raised by demurrer. Neither can it be raised by motion in arrest of judgment, for the fact of difference in the offenses charged would not appear of record. The proper method seems to be by motion to quash, though the Commonwealth might be required to elect on which one it would proceed.

23. **INDICTMENT AND INFORMATION—*Charging Two or more Offenses in the Same Indictment.***—There is no reason on principle why even two felonies of the same nature and punishable in the same manner may not be charged in different counts of the same indictment.
24. **INDICTMENT AND INFORMATION—*Election Between Counts.***—Inasmuch as Acts 1916, chapter 146, section 7, permits more than one offense to be charged in a single count, the defendant has not the absolute right to demand of the attorney for the Commonwealth that he should elect for which of the several offenses he would prosecute. He might desire to prosecute for more than one. It is a matter resting in the sound discretion of the trial court whether or not an election should be compelled.
25. **CRIMINAL LAW—*Election Between Counts.***—While the Commonwealth must be permitted to charge an offense in various ways to meet the evidence as it may be adduced on the trial, if, by reason of charging several distinct offenses widely separated by time, place and circumstances, the defendant will be seriously embarrassed in making his defense, whether the offense be felony or misdemeanor, an election should be compelled.
26. **CONSTITUTIONAL LAW—*Construction—Statute Adopted from Another State—Constitutionality.***—While the interpretation by the highest court of a State from which a statute is taken will be followed, the legislature cannot, by enacting a statute which has been held constitutional and valid by the highest court of another State, deprive the courts of this State of the right to determine for themselves the constitutionality of such statute.
27. **INTOXICATING LIQUORS—*Evidence—Admissibility.***—On the trial of the violation of the prohibition act, two witnesses testified that they had bought liquor from the defendants, and that they also bought liquor from one T. The defendants offered T. as a witness, and proved by him that the prosecuting witnesses had not bought any liquor from him. The defendants then offered to prove by T. that the prosecuting witnesses broke open his house, broke into his trunk and took out a gallon of whiskey.

Held: That the latter evidence was irrelevant.

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28. INTOXICATING LIQUORS—*Prohibition Law—Possession as Prima Facie Evidence.*—Section 55 of the prohibition act, Acts 1916, page 215, declaring that possession of certain quantities of liquor should be *prima facie* evidence that the one in possession had the same for sale, makes no distinction as to the time of the acquisition of the liquor, whether before or after November 1, 1916.
29. CONSTITUTIONAL LAW—*Power of Legislature—Rules of Evidence.*—Section 55 of the prohibition act, Acts 1916, page 215, declaring that the possession of certain quantities of liquor shall be *prima facie* evidence of a purpose of sale, merely establishes a rule of evidence; and that such rules may be established by the legislature is well settled.
30. INTOXICATING LIQUORS—*Instructions—Instructions Read in Light of the Evidence.*—In a prosecution under the prohibition act the jury were instructed, amongst other things, that if they believed that the defendants kept or stored ardent spirits for sale or to give away they would be as guilty as if they had actually sold or given away ardent spirits. Although under different circumstances this instruction would be misleading, if not erroneous, as the act allows gifts in one's own home, but as instructions must be read in the light of the evidence offered on the trial, and in the instant case the evidence was of a sale and not of a gift, and at a restaurant and not in a home, the instruction could not have misled the jury.
31. INSTRUCTIONS—*Refusal of Instruction Covered by One Given—Intoxicating Liquors.*—Where in a prosecution under the prohibition act the court instructed the jury as follows: "The court instructs the jury that if they believe from the evidence that the defendants purchased the liquor prior to November 1, 1916, and had it for their own use and not to sell and did not sell the same, they should find them not guilty," it is not error to refuse, at the request of defendants, the following instruction: "The court instructs the jury that if they believe from the evidence that the defendants had the liquor in their possession prior to November 1, 1916, at which time the present liquor law came into effect, then such possession creates no presumption against them." If the second instruction be conceded to be a correct statement of the law, defendants could not have been injured by its refusal, as the first instruction, given at their instance, stated the law as favorably to them as they were entitled to.
32. INSTRUCTIONS—*Refusal of Instruction Covered by One Given—Intoxicating Liquors.*—In a prosecution under the prohibition act, defendants requested the court to instruct the jury that

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notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt, still, if the evidence shows that the liquor was purchased before November 1, 1916, and stored away by the defendants for their own use, then the *prima facie* evidence is overcome and the Commonwealth must prove by clear, distinct and reliable evidence that the defendants had the liquor for the illegal purpose mentioned in the indictment.

Held: If there was any error in refusing this instruction, it was harmless, as the court had already given, at the instance of the defendants, the following instruction which sufficiently protected their rights: "The court instructs the jury that notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt, still if you believe from the evidence that the liquor was purchased before November 1, 1916, and stored away by the defendants for their own use, you should find them not guilty."

33. INTOXICATING LIQUORS—*Prohibition Act—Possession of More than One Gallon of Liquor.*—The prohibition act does not make it unlawful for a person to keep in his home for his personal use an amount of distilled liquor in excess of one gallon, if the possession was lawfully acquired. The act simply declares what the presumption shall be from such possession, and by the terms of the act the presumption is merely *prima facie* and may be rebutted.

Error to a judgment of the Corporation Court of the city of Roanoke.

Affirmed.

The opinion states the case.

Hoge & Darnall, Lawson Worrell and A. J. Oliver, for the plaintiffs in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General Leslie C. Garnett and Leon M. Bazile, for the Commonwealth.

BURKS, J., delivered the opinion of the court.

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The plaintiffs in error were indicted, tried and convicted under the prohibition act (Acts 1916, p. 215). The indictment was framed under section 7 of the act, which, so far as necessary to be quoted, is in the following words:

"Sec. 7. While any good and sufficient indictment may be used, an indictment for any first offense under sections three, four and five, of this act, shall be sufficient if substantially in the form or to the effect following:

" 'State of Virginia,

" 'County of to-wit:

" 'In the circuit court of.....county:

" 'The grand jurors in and for the body of said county of and now attending said court at its term, nineteen, upon their oaths, do present that within one year next prior to the finding of this indictment, in the said county of, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the Commonwealth of Virginia.' "

The indictment contains but one count, and that is in the language of the statute. The defendant demurred to the indictment, but their demurrer was overruled, and this action of the court is assigned as error. The demurrer raised the question of the constitutionality of the act. One of the grounds of unconstitutionality is that it violates section 62 of the Constitution, hereinafter quoted. There is nothing in the record to indicate that this objection was made in the trial court. It was not made in the petition for the writ of error, nor referred to in the brief for the Commonwealth, but was made for the first time in the reply brief for plaintiffs in error. This, however, is immaterial. Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If

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that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, pleas, motion, or otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time. *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 Am. St. Rep. 705, and cases cited.

The constitutionality of the act is challenged on the ground that the whole legislative power over intoxicating liquors is declared by section 62 of the Constitution, and that under the rule, *expressio unius est exclusio alterius*, the granting of certain powers is the exclusion of all others. What powers the legislature has exercised which have not been granted have not been pointed out. The clause of the Constitution referred to is as follows:

"The General Assembly shall have full power to enact local option or dispensary laws, or any other laws, controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors."

The maxim, *expressio unius est exclusio alterius*, though often of importance and value, is not of universal application, even in the interpretation of State Constitutions. They are the fundamental, permanent law of the land, providing for the future as well as the present, and should carry out the principles of government as gathered from the instrument when read as a whole. The application of arbitrary rules of construction will be resorted to with hesitation, especially when it would bring about results contrary to the declared public policy of the State, and hamper the legislature in amply providing for the health, morals, safety and welfare of the people. Only those things expressed in such positive affirmative terms as plainly imply the nega-

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tive of what is not mentioned, in view of the known policy of the State, will be considered as prohibiting the powers of the legislature. The principle of the maxim should be applied with great caution to those provisions of the Constitution which relate to the legislative department, and the exclusion should not be made unless it appears to be a plainly necessary result of the language used. *Schubel v. Olcott*, 60 Ore. 503, 120 Pac. 375; *State v. Martin*, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; *Sumpter v. Duffie*, 80 Ark. 369, 97 N. W. 435; *State v. Bryan*, 50 Fla. 293, 39 So. 929.

In determining whether an act of the legislature is forbidden by the State Constitution, it must be borne in mind that the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it has been taken away; that the legislature is practically omnipotent in the matter of legislation, except in so far as it is restrained by the Constitution, expressly or by plain, or (as some of the cases express it) by necessary, implications; that the mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a co-ordinate department of the government; that every act is presumed to be constitutional until the contrary is made plainly to appear, and that all doubts on the subject are to be solved in favor of its validity. These principles and these presumptions are not of mere local application, but are common to practically all of the States. Authority is so abundant as to be easily found, and it would unnecessarily burden this opinion to do more than cite a few of the late cases by way of illustration. *Button v. State Corporation Commission*, 105 Va. 634, 54 S. E. 769; *Henry's Case*, 110 Va. 879, 65 S. E. 570, 26 L. R. A. (N. S.) 883; *McGrew v. Mo. Pac. R. Co.*, 230 Mo. 496, 132

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S. W. 1076; *Butler v. Board, etc.*, 99 Ark. 100, 137 S. W. 251; *People v. Prendergast*, 202 N. Y. 188, 95 N. E. 715; *Imp. Irr. Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914 B, 322; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 772; *State v. Patterson*, 181 Ind. 660, 105 N. E. 228; *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177; *Bullitt v. Sturgeon*, 127 Ky. 332, 105 S. W. 468, 14 L. R. A. (N. S.) 268; *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462.

On no subject have the legislatures been given a freer hand than in dealing with intoxicating liquors. It has been so far regarded as an enemy of mankind that the most drastic legislation to suppress its use by the public has been upheld by the courts. We cite a few cases simply as illustrations: *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184; *James Clark Distilling Co. v. Western Mo. R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917 B, 1218; *Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652, L. R. A. 1916 C, 278; *Delaney v. Plunkett* (Ga.) 91 S. E. 561; *State v. Phillips*, 109 Miss. 22, 67 So. 651, L. R. A. 1915 D, 530; *Glenn v. Southern Express Co.*, 170 N. C. 286, 87 S. E. 136. For collection of cases, see 17 Am. & Eng. Ency. Law (2d ed.) 207, *et seq.*

In this State, from the earliest date to the adoption of the present Constitution, the legislature has exercised uncontrolled power over the manufacture and sale of intoxicating liquors, and since local option and dispensary laws have come into vogue, has exercised undisputed authority and control over these subjects also. In view of these facts, it would require very plain language to convince us that it was the purpose of the constitutional convention to take away from the legislature of this State a power exercised by the legislatures of the other States of the Union,

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and one that has been within the province of the legislature of this State from the earliest date.

The constitutional provisions relating to the legislative department have been classified as mandatory and prohibitive. The oaths of the legislators bind them to the performance of the one, and the courts restrain them from the performance of the other, if they should overstep the limits set. As to all other powers they are free to act as their judgments dictate.

"In the partition of power between the three departments of government, the power of making laws is conferred on the General Assembly; some laws they are compelled by mandate to make; other laws they are forbidden to make; these are the only limits to their powers; all subjects of legislation not affected by mandate, nor by prohibition, are within the discretion of the General Assembly." *Commonwealth v. Drewry*, 15 Gratt. (56 Va.) 1, 5.

As the legislature has all legislative power not taken away by the Constitution, it would seem that the classification into mandatory and prohibitive provisions was in the main correct. Constitutions, however, sometimes contain other provisions relating to or affecting the legislative department, which may be classified as either permissive or declaratory. This is especially true of modern Constitutions which enter into greater detail and more nearly approximate legislation than formerly. Indeed, some of their provisions are purely legislative in character. When the Constitution has fully dealt with a subject and covered the entire ground, the legislature would be powerless to make any change in it, unless specially authorized to do so, and it may be desirable to confer such authority. In such case the authority is conferred by a permissive grant in the Constitution. *McGurdy v. Smith*, 107 Va. 757, 60 S. E. 78; Constitution 1902, secs. 89, 95, 100, 101. In other cases the constitutional provision is only declaratory of the

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existing law, and there may or may not be annexed to it a prohibitory provision. For example, section 47 declared that, "Each house shall judge of the election, qualification, and returns of its members; may punish them for disorderly behavior, and, with the concurrence of two-thirds, expel a member." There is no grant of power here that did not exist before, nor does the declaration of the power inhibit the house from exercising other powers, such as the suspension of a member, or the imposition of a penalty for neglect of duty, but he cannot be expelled by less than a two-thirds vote. Again, that portion of section 175 of the Constitution which declares, "but the General Assembly may, from time to time, define and determine such natural beds, rocks or shoals, by surveys or otherwise," conferred no power on the General Assembly which it did not possess before, but is simply declaratory of the existing law.

The presumption is that the same meaning attaches to a given word or phrase which is repeated in a Constitution, unless the contrary is made to appear, and hence the whole instrument should be examined to ascertain what that meaning is. *Green v. Weller*, 32 Miss. 650. There are but four sections of the Constitution containing the phrase "The General Assembly shall have power." These are sections 100, 101, 62 and 84. The first two plainly belong to the class of *permissive* provisions, and were necessary to enable the legislature to act on the subject at all. The convention had dealt fully with the whole subject of courts, and marked out a complete system, and if this was to be changed in any way, it was necessary for the Constitution to provide that, "The General Assembly shall have power" to make the change. Hence, the provisions permitting the legislature to establish courts of land registration, and to confer certain jurisdiction upon clerks of circuit courts. Section 86, however, is purely declaratory of the existing

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law, and conferred upon the legislature no power not previously possessed by it. That section declares, "The General Assembly shall have power to establish and maintain a Bureau of Labor and Statistics, under such regulations as may be prescribed by law." The word "bureau" means, "A subordinate department, or a division of a principal department;" "A department or force of men transacting a particular branch of public business." Standard Dict., Bouvier's Law Dict.; *Button v. State Corp. Com.*, 105 Va. 634, 639-40, 54 S. E. 769. These definitions show that the word "bureau" is used to express the same idea as that commonly expressed in the legislation of this State by the word "board," as for example, the "board of education." If the maxim, *expressio unius est exclusio alterius*, be applied to this section, then the power conferred to establish a "Bureau of Labor" excludes the idea of any other bureau, and the legislature would be powerless to establish a bureau of charities and corrections, a bureau of fisheries, a bureau of game, a legislative bureau, a bureau of printing, or of highways, and probably of education; and, indeed, of any other subjects. Yet all of these bureaus or boards have been established long ago, and during the fifteen years the Constitution has been in operation, there has not been even an intimation that the legislature did not have power to establish them. The conclusion is almost irresistible that no objection has been raised simply because there was no foundation for it. The section is clearly simply declaratory of the existing law.

The only remaining section containing the phrase, "The General Assembly shall have power" is section 62. It differs slightly, but significantly, from the phrase contained in the other sections. In order to avoid the idea of a limitation to any extent whatever on the legislative power, it declares that the General Assembly shall have *full* power. No new power whatever is conferred upon the legislature.

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It does not authorize the enactment of a single law the legislature might not have enacted if the section had not been adopted. It is simply declaratory of the existing law, but thereby inviting attention to the subject. At the time of its adoption there had been no abatement in the zeal of temperance advocates, and there is nothing to indicate an intention on the part of the State to release its power over the whole subject of intoxicating liquor. It is not to be presumed that the convention, while declaring that the General Assembly had "full power" over the subjects mentioned in the section, meant by its silence to take away a power that had existed from the foundation of the government. No language used takes from the legislature full power and authority over the whole subject, but a rule of construction is invoked to take it away by implication. We are unwilling, under the circumstances, to imply a revocation of a power of such long existence. If the convention had desired to restrain the legislature in this matter, after so great a lapse of time, we are satisfied it would have done so in express terms. Certainly we are unwilling to imply such restraint. Generally, when the convention has desired to place a restraint upon the legislature, it has done so expressly, as by providing that the General Assembly *shall not* charter a church, pass a bill of attainder, *ex post facto* law, law impairing the obligation of a contract, applying a religious test, authorizing a lottery, or the like. In the instant case, complete authority over the whole subject of intoxicating liquors has not been taken away from the legislature by an express provision, nor do we think it results by necessary implication.

This view of the nature of section 62 of the Constitution is confirmed by the debates thereon in the convention. During the discussion of a motion to strike the section out, Mr. R. Walton Moore said: "This morning I inquired of some

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of the members of the committee, including the chairman, if any question seemed to exist as to the power of the General Assembly to enact a dispensary system, unless authorized by the Constitution. They answered in the negative." Mr. Quarles said he had seen in the press that some circuit court had held a dispensary law unconstitutional and he wished to remove all doubt on the subject. Proceeding further to insist on the retention of the section, he said: "What harm will it do? Why should not every doubt about the question whether or not the legislature has full power to deal with this matter be removed? It may do some good and I think it will; it certainly can do no harm. I think the legislature has the power already, but I may be wrong." Thereupon, the section was adopted. Debates Constitutional Convention, pages 2751-2.

The court is of opinion that the purpose of the act is a wise one, but even if it were of a different opinion, it could make no difference in the result so long as it is within the legislative power, for judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed. As said in *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184: "It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323; *Ah Sim v. Wittman*, 198 U. S. 500, 504, 25 Sup. Ct. 756, 49 L. Ed. 1142; *New York, ex rel. Silz*

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v. *Hesterberg*, 211 U. S. 32, 29 Sup. Ct. 10, 53 L. Ed. 75; *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

We are of opinion that the provisions of the act of Assembly approved March 10, 1916 (Acts 1916, page 215), commonly known as the prohibition act, so far as called in question in this case, are not forbidden by section 62 of the Constitution of this State.

Counsel for plaintiffs in error cited *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, as authority for the position that the prohibition statute in this State is unconstitutional. In that case the Constitution of West Virginia declared that, "Laws may be passed regulating or prohibiting the sale of intoxicating liquor within this State." Const., Art. 6, sec. 46. The legislature of West Virginia enacted a statute making it a penal offense to "solicit or receive orders for, or *keep in his possession for another*" (Code 1887, chap. 32, sec. 1, as amended by Laws 1887, chap. 29), intoxicating liquors. The court held that the act was in conflict with both the federal and State Constitutions, and was therefore void. The decision was made in 1889, and is not in consonance with the authorities hereinbefore cited, most of which are of much more recent date. For this reason we are unable to follow it.

Another objection to the indictment is that it contains but one count, and yet it charges many offenses, and that it does not inform the defendant of "the cause and nature of his accusation."

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The act covers thirty printed pages and abounds in offenses created and penalties imposed. Section 3 of the act defines about one dozen specific crimes, and section 5 declares that any person who shall violate *any provision of this act*, shall, except as otherwise herein provided, be deemed guilty of a misdemeanor. Section 7, as we have seen, declares that "while any good and sufficient indictment may be used, an indictment for any first offense under sections three, four and five of this act, shall be sufficient if substantially in the form or to the effect following." The allegation, therefore, that the single count charges more than one offense is fully sustained. All of the offenses charged, however, are misdemeanors. It has been held more than once in this State that, while any number of misdemeanors of the same nature and punishable in the same manner may be charged in the same indictment, there must be a separate count for each offense, and that a defendant cannot be convicted of more offenses than there are counts. *Mitchell's Case*, 93 Va. 775, 20 S. E. 892; *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677. If the defendant cannot be "convicted of more offenses than there are counts" in the indictment, it follows that he cannot be lawfully charged with more than one offense in a single count.

We have no disposition to detract from anything said in the cases cited, but they must be read in the light of the conditions existing when they were rendered. At that time there was no statute on the subject, and they announce the principle existing *in the absence of statutory regulation*. The act under consideration in effect declares that more than one offense arising under the statute may be charged in a single count. The power of the legislature to change rules of procedure is unquestionable, except as restrained by the Constitution, and we can see no good reason why it may not provide that what has heretofore required several

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counts in an indictment may now be accomplished by a single count, provided the prisoner is not unlawfully prejudiced thereby. If the prisoner is not prejudiced, it is a matter of mere procedure and clearly within the province of the legislature. The prisoner is not so prejudiced if he is fully put upon notice of the cause and nature of the offense with which he is charged, and is afforded ample opportunity to make his defense.

It is claimed by the plaintiffs in error that the constitutional provision, "that in all criminal prosecutions a man hath the right to demand the cause and nature of his accusation" (Const. 1902, sec. 8), has been ignored. It is a fundamental proposition that in all cases, civil as well as criminal, a person haled into court has the right to demand that he be told in plain, intelligible language what is the cause of the complaint against him; and this right, in so far as it relates to crimes, is guaranteed by both the federal and State Constitutions; the federal Constitution, applicable to prosecutions by the United States, declaring that, "In all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation" (amendment VI), and the State Constitution, "That in all criminal prosecutions a man hath the right to demand the cause and nature of his accusation." (Va. Const., sec. 8.) It will be observed that the language of the two Constitutions is substantially the same. We have no case in Virginia defining what is meant by "cause and nature of the accusation," but it is very clearly set forth by Chief Justice Waite in *United States v. Cruikshank*, 92 U. S. 543, 23 L. Ed. 588. Paragraph 12 of the syllabus in that case, taken almost literally from the opinion, is as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.'

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The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species—it must descend to particulars. The object of the indictment is—first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.”

After thus stating the law, the Chief Justice gives a number of instances of allegations deemed too vague and uncertain, and says: “The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court that it may determine whether the facts will sustain the indictment.”

To the same effect is *Head's Case*, 11 Gratt. (52 Va.) 819, and *Arrington's Case*, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, holding that the indictment must always allege the offense with such fullness and precision that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defense, and that the conviction

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or acquittal may be pleaded in bar of any future prosecution for the same offense. The subject is discussed with ability by Downey, C. J., in *McLaughlin v. State*, 45 Ind. 338. In *State v. Terry*, 109 Mo. 601, 19 S. W. 206, Sherwood, C. J., goes into the subject very fully, and discusses it with ability. In that case the legislature of Missouri had passed a statute on the subject of obtaining money by false pretences and authorized a brief form of indictment without giving the necessary details of the offense. Commenting upon the indictment prescribed by this statute, the Chief Justice said: "The legislature may change it in form, but cannot change the substance of its material averments, without impinging upon constitutional guaranties."

Referring to the provision of the Bill of Rights of that State, similar to the Bill of Rights in this State, declaring that a man has the right to demand the cause and nature of his accusation, he said: "The right to make such a demand is just as great, just as mandatory, as any other of the kindred rights grouped together in the same section of the Constitution. So that the simple question is here presented, does an indictment which follows the statutory form prescribed, and uses the precise language set forth in the section quoted, meet with the requirements of the Constitution? * * * But the 'nature and cause' of an accusation are not stated where there is no mention of the full act, or series of acts, for which the punishment is to be inflicted."

In 1 Arch. Crim. Pl. & Pr. 88, it is said: "The principal rule as to the certainty required in the indictment may, I think, be correctly laid down thus: That where the definition of an offense, whether by a rule of common law or by a statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars." To

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the same effect see *Mears v. Com.*, 2 Grant. Cas. (Pa.) 385; *Com. v. Phillips*, 16 Pick. (Mass.) 211; *U. S. v. Mills*, 7 Pet. 142, 8 L. Ed. 636; *United States v. Cook*, 17 Wall. 174, 21 L. Ed. 538; *State v. Learned*, 47 Me. 426; 1 Chitty Cr. Law, 170; 1 Bishop Cr. Pr., secs. 81, 86, 88, 519.

Tested by the doctrine of these cases, the indictment under consideration, standing alone and unaided by the particulars of the offense, is, in some of its aspects, plainly insufficient. For instance, by section 3 of the act it is made an offense to "transport" for sale ardent spirits, and yet the indictment, under section 7, nowhere mentions "transport" as one of the offenses of which evidence may be offered. Section 3 makes it an offense to "advertise" for sale, or to "aid in procuring ardent spirits" without stating the facts constituting the offense; and by section 4 it is made an offense to act as "agent" or "employee" in certain instances, without stating the facts showing such agency or employment; but these various offenses may be committed in different ways. In fact, there may be serious conflict as to whether a given act amounts to advertising, or amounts to aiding, or to acting as agent or employee, in all of these cases. We have but to look to section 19 of the act on the subject of advertising to show the various kinds of acts which may be done and which are punishable as violations of the act, and yet the indictment gives the defendants no notice of them. Ordinarily, the acts done should be charged, in order to give the defendant the necessary information. It is the function of an indictment to charge facts and not legal conclusions. *Bishop's Case*, 13 Gratt. (54 Va.) 785. The indictment undertakes to charge the defendant with all of the first offenses under sections 3, 4 and 5 of the act, but does not fully inform the defendant "with clearness and certainty" of the "cause and nature of his accusation."

While the Constitution guarantees to every man the right to demand "the cause and nature of his accusation,"

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it does not prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment or information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand "the cause and nature of his accusation." If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and which he will be held to have waived unless he asserts it.

We have no case in this State involving the right to demand a bill of particulars of either the Commonwealth or the defendant in a criminal case, but the practice is a common one in a great majority of the States, and also in the federal courts. 22 Cyc. 371-2, and cases cited. In *Mathis v. State*, 45 Fla. 46, 34 So. 287, a very comprehensive review of the authorities is given, but it is not deemed necessary to refer to or discuss them further than to say that, in a number of the cases referred to, it is said that the granting of a bill of particulars lies in the discretion of the trial court whose ruling on the subject is not subject to review. In many cases this is probably true, but it is not true where the charge in the indictment is too general and indefinite to appraise the defendant of the cause and nature of his accusation, without the aid of some sort of specification, or a bill of particulars. Wherever this is the case it is reversible error for the trial court to refuse to require such particulars to be furnished.

Except in the single case of an indictment under the prohibition law, the law of this State is that there cannot be more offenses than there are counts in the indictment, and, if the Commonwealth offers evidence of more than one, the proper practice is for the defendant to ask the court to compel the Commonwealth to elect to which one it will

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prosecute. *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677.

The right to call for, and the duty to furnish, a bill of particulars in civil cases is of frequent application, and is regulated by section 3249 of the Code. The statute confers the right "in any action or motion," and declares how it may be enforced. We do not think that this statute was intended to apply to a criminal prosecution, but the right is inherent in the trial court in the orderly administration of justice, to prevent wrong and injustice to persons who are presumed to be innocent, and to assure to them their constitutional rights. *State v. Lewis*, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913 A, 1203. It is not to be presumed that less particularity is required in a criminal prosecution than in a civil action. The object of the bill is to state with greater particularity than is done in the indictment "the cause and nature of his accusation." The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by a bill of particulars; but if the offense is not charged in the indictment, the defect cannot be supplied by a bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. Such being the function of the bill of particulars, it is readily observed that by giving an absolute right to demand it, the indictment may be greatly simplified, as is done in the present instance, and at the same time no injury or injustice be done to the accused.

The language of the indictment is comprehensive enough to embrace the offenses intended to be charged, but as to some of these is not specific enough to give to the defendants the information to which they are entitled. Prior to the statute, every misdemeanor enumerated in the statute

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might be charged in separate counts in one indictment, but each count would have to set out the offense with requisite certainty. The change made by the statute consists in allowing all of the offenses to be charged in one count, instead of many counts, but whether charged in one or many, either the indictment itself must inform the defendant of the cause and nature of his offense, or this information must be furnished in some other way if demanded. If it is not given in the indictment, and no other method is provided for giving the information, the defendant will be denied his constitutional right. The same section of the Constitution which gives to him the right to demand the cause and nature of his accusation, also gives to him the right to a jury trial. He is as much entitled to one as to the other. If a jury trial is denied in the administration of criminal law, it is as much a violation of the constitutional right of the defendant as if it had been denied by statute. Hence, if the frame of the indictment under section 7 be upheld, as we think it should be, then the defendant must, in some other way, in proper cases, when demanded, be informed of the cause and nature of his offense, else he will be denied a constitutional right by the manner in which the statute is administered. We cannot look to the evidence and say that the defendant has not been injured by a denial of this right. As well might we say that if a defendant was clearly guilty and a jury trial had been refused, no injury has been done him. A denial of a constitutional right is of itself reversible error. We suppose that no one would doubt that however guilty a defendant might be, if the trial court denied him a jury trial, its judgment would of necessity have to be set aside. It is no greater hardship to require the Commonwealth to give the prisoner such information of the offense charged against him as will enable him to prepare to meet the charge than it is to require a private litigant to furnish like information to his op-

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ponent. The act under which the defendants were indicted requires that it shall have a liberal construction, and we think we have given it such a construction in upholding the sufficiency of section 7. We have not in any way marred its efficiency by requiring a bill of particulars stating the nature of the offense in proper case, when demanded. As pointed out by Judge Buchanan in *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677, all of the jurors may think that the accused is guilty and so find him, without having in fact agreed that the evidence as to any particular sale was sufficient," when in fact the prisoner is entitled to a unanimous verdict on every offense charged. Whether or not he shall be tried for more than one offense is to be determined by other considerations, which involve the doctrine of election.

The subject of election has been discussed in a number of cases before this court, some of them misdemeanors and some felonies. *Dowdy's Case*, 9 Gratt. (50 Va.) 727, 60 Am. Dec. 314; *Lazier's Case*, 10 Gratt. (51 Va.) 708; *Anthony's Case*, 88 Va. 847, 14 S. E. 834; *Lewis' Case*, 90 Va. 843, 20 S. E. 777; *Benton's Case*, 91 Va. 782, 21 S. E. 495; *Mitchell's Case*, 93 Va. 775, 20 S. E. 892; *Johnson's Case*, 102 Va. 927, 46 S. E. 789; *Fletcher's Case*, 106 Va. 840, 56 S. E. 149; *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677; *Dix's Case*, 110 Va. 907, 67 S. E. 344. It is unnecessary to examine these cases in detail. Many of them are cases which involved but a single offense, charged in different ways; some of them involved more than one offense; but in none of them has it been held that if more than one offense has been charged in the indictment, the prisoner will be compelled to go to trial on all, where it is made to appear that they are so separated by time and circumstance that it would confuse and disconcert him in preparation for the trial or the jury in consideration of the case.

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As time is not of the essence of a felony, it cannot generally be told from the face of the indictment whether or not the defendant would be prejudiced by trying him for the several offenses charged in the different counts of the indictment. Each count, in theory at least, is for a separate and distinct offense, while, in fact, it may be but one offense so charged as to meet the different phases of the evidence as it may appear on the trial. It would seem, therefore, that the objection to the charge of more than one offense in the same indictment cannot, as a rule, be raised by demurrer. Neither can it be raised by motion in arrest of judgment, for the fact of difference in the offenses charged would not appear of record. The proper method seems to be by motion to quash (*Dowdy's Case, supra*), though the Commonwealth might be required to elect on which one it would proceed.

There is no reason on principle, however, why even two felonies of the same nature and punishable in the same manner may not be charged in different counts of the same indictment. Thus, where two men are killed in a single fight and the witnesses are the same, so that he could not well introduce the testimony as to one without that as to the other, the prisoner could not be confused, and there is no reason why the two offenses may not be united in the same indictment and tried at the same time, *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

In *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677, there was but a single count in the indictment, charging the defendants with selling liquor without license to four persons, who were named, and others, "on the — day of March, in the year 1906, and at divers other times within the twelve months last past," and under that count evidence had been admitted tending to show a number of distinct sales running over a period of several months. At the conclusion of the Commonwealth's evidence, the defendant

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made a motion to require the Commonwealth to elect upon which sale it intended to rely for a conviction. This motion the trial court overruled. In commenting upon this feature of the case, this court said: "While a party may be tried upon the same indictment for several misdemeanors of the same nature and upon which the same or similar judgments may be rendered, there must be a separate count for each offense, for he cannot be convicted of more offenses than there are counts. 1 Bish. New Proc., section 460; *Mitchell's Case*, 93 Va. 775, 20 S. E. 892.

"This being so, it would seem clear upon principle that the defendants had the right to have the Commonwealth make an election. Because of the difficulty the Commonwealth has in prosecuting offenses of this kind, or for some other reason, there has been in this class of cases some relaxation of the strict rules as to pleading and the introduction of evidence which generally prevail in criminal cases. When under these relaxed rules the Commonwealth has been allowed to allege, and to offer evidence to prove, more than one offense, there does not seem to be any reason why, at the conclusion of the Commonwealth's evidence and before the defendant offers his evidence, it should not be required to elect upon which sale it seeks a conviction. By requiring such an election the prisoner knows what charge it is necessary for him to meet in making his defense. This in common fairness he has a right to know. Such a course also saves time and expense by rendering it unnecessary for the defendant to offer evidence to disprove any other charge. It brings the mind of the jury to the consideration of a single sale. Another reason why the Commonwealth should be required to elect where evidence has been introduced as to a number of offenses, and there can only be a conviction as to one sale, is that some of the jurors may believe that the evidence of a particular sale is sufficient to convict, while others may think the evidence of that sale is not suf-

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ficient, but are satisfied that some other sale has been proved. All of the jurors may think that the accused is guilty, and so find him, without in fact having agreed that the evidence as to any particular sale was sufficient. The result is that if there is no election the accused, who is indicted for one offense, is tried for many and convicted of one, but of which one of the many the court cannot say.

"It may be that juries are not likely to be so careless as to bring in a verdict without an agreement of the part of all as to a particular sale, but it is a danger which can be avoided by requiring an election."

This case has been cited, with approval, a number of times. In *Dix's Case*, 110 Va. 907, 67 S. E. 344, referring to the subject of election, the statement of Mr. Bishop is again approved, that "the better view seems to be that that question should be left to the discretion of the trial judge, to be exercised with reference to the special facts of the case." Both of these cases were indictments for misdemeanors.

Inasmuch as the statute under which the defendants were indicted permits more than one offense to be charged in a single count, we do not think that the defendants had the absolute right to demand of the attorney for the Commonwealth that he should elect for which of the several offenses he would prosecute. He might desire to prosecute for more than one. It was a matter resting in the sound discretion of the trial court whether or not an election should be compelled. This was to be determined by considerations entirely different from those which give the right to a specification of the particulars of the offense.

Specification, or a bill of particulars, is allowed in order to apprise the defendant of "the cause and nature of his accusation," when the indictment is not sufficiently specific for that purpose; election, to avoid embarrassing him in

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making his defense after he has been apprised of the particulars of the several offenses charged.

On account of the gravity of the punishment, this court has been more particular in compelling election in felony cases than in misdemeanors, but the same principle would seem to apply in the one case as in the other. While the Commonwealth must be permitted to charge an offense in various ways to meet the evidence as it may be adduced on the trial, if, by reason of charging several distinct offenses widely separated by time, place and circumstances, the defendant will be seriously embarrassed in making his defense, whether the offense be felony or misdemeanor, the election should be compelled.

Upon a review of the cases and a consideration of the principle involved, we deem it best, where several distinct misdemeanors are charged in the same indictment, to leave it to the sound discretion of the trial court to determine whether or not there shall be an election, only remarking that where the evidence offered of one transaction is widely separated by time, place and circumstances from that offered of another transaction, so that the prisoner would be embarrassed in making his defense if compelled to try both at the same time, the Commonwealth should be compelled to elect on which one, it will proceed.

Although the Commonwealth is active in the suppression of crime, and prompt and vigorous in its punishment, it is very jealous of the liberty of the citizen, and throws around him every safeguard of a fair and impartial trial. It gives him the "right to demand the cause and nature of his accusation," thereby assuring him of all needful information of the offense with which he is charged; it guarantees to him "a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty," thereby assuring him a prompt trial, an impartial tribunal and a just verdict; and it warns the jury that they

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are not to convict unless satisfied of the guilt of the accused beyond a reasonable doubt. It has been hereinbefore pointed out that some of the offenses charged in sections three and four of the act are not sufficiently described in the indictment, and if the defendants had demanded a more specific statement of the "cause and nature" of their offense, and it had been refused, the Commonwealth would have been limited in its proof to those that were adequately described, and proof of other offenses would have been a denial of the constitutional right to demand "the cause and nature" of their offense. But in the instant case, no such demand was made, and it is not disclosed by the record that any right was denied them, or that any injustice has been done them.

A number of cases have been cited by the learned Attorney General to the effect that it is sufficient to charge a statutory offense in the language of the statute defining it, but they have no application to an omnibus charge of numerous offenses, all of which could not have been committed by one person at the same time, and which leaves the defendant in doubt and uncertainty upon which a conviction will be asked. *State v. Terry, supra; United States v. Cruikshank, supra.*

It is also said that section 7 of the act under consideration was taken from the West Virginia statute, which has been held to be a valid enactment by the Supreme Court of that State, and it has been argued by the Attorney General that by adopting the act of West Virginia the legislature also accepted the construction thereof by the Supreme Court of that State, including the determination of its validity and sufficiency. But it has been recently held by this court: "While the interpretation by the highest court of a State from which a statute is taken will be followed, the legislature cannot, by enacting a statute which has been held constitutional and valid by the highest court of another

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State, deprive the courts of this State of the right to determine for themselves the constitutionality of such statute.” *Boyd v. Ritter Lumber Co.*, 119 Va. 348, 89 S. E. 273.

On the trial of this case, after the Commonwealth had introduced two witnesses, Viola Ross and Mary Williams, who testified that they had bought the liquor with which they were made drunk from the defendants, and that they had also bought liquor from J. T. Thompson, the defendants offered J. T. Thompson as a witness, and proved by Thompson that the two prosecuting witnesses had not bought any liquor from him. The defendants then offered to prove by Thompson that the two prosecuting witnesses, Viola Ross and Mary Williams, broke open his house while he was at church, broke into his trunk and took out a gallon of whiskey. The Commonwealth's attorney objected to this testimony as being irrelevant, and the court sustained the objection, and refused to allow the defendants to introduce that evidence. This action of the trial court is assigned as error.

There was no error in the ruling of the court. The charge against the defendants was the sale of intoxicating liquor, and this charge was sustained by the evidence of the two witnesses mentioned. Evidence that the same two witnesses broke into the house of the witness Thompson, and stole a gallon of whiskey, and were afterwards found drunk, was wholly irrelevant to the offense with which defendants were charged; and the larceny alleged threw no light on the illegal sale. Both charges may have been true.

Objection is also made to the ruling of the trial court in granting and refusing instructions. Instructions “A” and “B,” given for the Commonwealth, were as follows:

“A.” “The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendants, John Pine and Sarah Scott, or either of them, had in their. or his. or her possession, in their, or his, or her home, as the case may be, in the city of Roanoke,

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Virginia, at any time within the time laid in the indictment in this case, more than one gallon of distilled liquor, or more than three gallons of beer, that this would be *prima facie* evidence that the said defendants, or the one so in possession of such distilled liquor, or beer, had the same for sale, although the jury may further believe from the evidence that said defendants, or the one so having in his or her possession, such distilled liquor or beer, acquired the same prior to November 1, 1916.

"The punishment for such an offense is by a fine of not less than \$50.00 nor more than \$500.00, and confinement in jail for a period of not less than one, nor more than six months."

"B." "The court instructs the jury that it is not alone an actual sale of ardent spirits, that constitutes an offense under the law, under which this indictment is drawn, but it is also an offense for a person to keep or store for sale, or to give away, or dispense ardent spirits under said law except in the manner therein provided; therefore, the court tells the jury, that although they may not believe from the evidence in this case that the defendants, or either of them, sold ardent spirits within the time mentioned in the indictment in this case, yet, if they do believe from the evidence in this case, beyond reasonable doubt, that the said defendants, or either of them, during the time laid in the indictment in this case, kept or stored ardent spirits for sale, or to give away, or dispense, as is alleged in the indictment, then they, or the one so keeping or storing for sale such ardent spirits, or to give away or dispense the same would be as guilty under the indictment in this case, as if they, or either of them, had actually sold or given away ardent spirits."

Instruction "A" is in substantial conformity with section 65 of the prohibition act (Acts 1916, p. 215), and is free from objection. The act on this point makes no distinction

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as to the time of acquisition of the ardent spirits, but declares that the possession shall be *prima facie* evidence of a "purpose of sale." It merely establishes a rule of evidence. That such rules may be established by the legislature is well settled both here and elsewhere. *Runde v. Commonwealth*, 108 Va. 873, 61 S. E. 792; *Commonwealth v. Austin*, 97 Mass. 505; *Frudic v. State*, 66 Neb. 244, 92 N. W. 320; *State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794; *Leavitt v. Baker*, 82 Me. 26, 19 Atl. 86.

Instruction "B" told the jury, amongst other things, that if they believed that the defendants kept or stored ardent spirits for sale or to give away they would be as guilty as if they had actually sold or given away ardent spirits. Under different circumstances this instruction would be misleading, if not erroneous, as section 61 of the act allows one in his own home to give away ardent spirits "when the quantity of such spirits shall not exceed the quantity allowed by this act." But instructions must be read in the light of the evidence offered on the trial. In the instant case, the evidence was of a sale and not of a gift, and at a restaurant and not in a home. The sale, if made, was illegal, no matter where made, or whether the ardent spirits were obtained before or after November 1, 1916, when the prohibition act went into effect. The instruction, therefore, could not have misled the jury.

Instruction No. 1, asked for by the defendants, was as follows:

"1. The court instructs the jury that if they believe from the evidence that the defendants had the liquor in their possession prior to November 1, 1916, at which time the present liquor law came into effect, then such possession creates no presumption against them."

The defendants could not have been injured by the refusal of this instruction, if it be conceded to be a correct statement of the law, as instruction 2, given at their in-

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stance, stated the law as favorably to them as they were entitled to. That instruction was as follows:

"The court instructs the jury that if they believe from the evidence that the defendants purchased the liquor prior to November 1, 1916, and had it for their own use and not to sell and did not sell the same, they should find them not guilty."

Instruction 4, asked for by the defendants, was as follows:

"The court instructs the jury that notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt, still, if the evidence shows that the liquor was purchased before November 1, 1916, and stored away by the defendants for their own use, then the *prima facie* evidence is overcome and the Commonwealth is then required to prove by clear, distinct and reliable evidence that the defendants had the same for the illegal purpose mentioned in the indictment and if the Commonwealth has not so proven, they should find the defendants not guilty."

If there was any error in refusing this instruction, it was harmless, as the court had already given, at the instance of the defendants, instruction 3 which sufficiently protected their rights. Instruction 3 was as follows:

"The court instructs the jury that notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt, still if you believe from the evidence that the liquor was purchased before November 1, 1916. and stored away by the defendants for their own use, you should find them not guilty."

It is further insisted, however, on the part of the Commonwealth that instruction 4 was erroneous because it is unlawful to keep, even in a home, more than one gallon of whiskey or etc. after November 1, 1916, no matter when or for what purpose acquired.

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Section 3 of the act declares, amongst other things, that "After November first, nineteen hundred and sixteen, it shall be unlawful for any person in this State to manufacture, transport, sell, keep or store for sale, offer, advertise or expose for sale, give away or dispense or solicit in any way, or receive orders for or aid in procuring ardent spirits, except as hereinafter provided." From this it was argued for the Commonwealth that it was unlawful for a person to "keep" in his home for his personal use an amount of distilled liquor in excess of one gallon. But we do not so construe the statute. The connection in which the word "keep" is used shows that it was not intended to apply to such a case. The language is, "sell, keep or store for sale, offer, advertise or expose for sale," etc., showing that the legislative purpose was to prohibit the keeping for the purpose of disposition to others, and not for private use. This is made more manifest when this section is read, as it must be, in connection with section 65, which declares that "the possession in his home of more than one gallon of distilled liquor * * * at any one time, shall * * * be *prima facie* evidence that such person possesses such distilled liquors * * * for the purpose of sale." If the contention of the Commonwealth be correct, that a person cannot "keep" in his home for private use more than one gallon of distilled liquor, then section 3 would be in direct conflict with section 65, which declares that such possession is only *prima facie* evidence of a "purpose of sale." It seems clear, therefore, that the act does not prohibit a possession in a home for private use, if the possession was lawfully acquired. Whether or not it is in the power of the legislature to prohibit such a possession in a reasonable quantity when the public is not affected thereby, it is not necessary to decide. No such question is presented, and it is sufficient to say that the present act does not prohibit such possession when lawfully acquired, but simply declares what the pre-

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sumption shall be. By the terms of the act the presumption is merely *prima facie* and may be rebutted.

Affirmed.

SIMS, J., concurring:

The case involves the preliminary and fundamental question—

1. Is section 62 of the Constitution of Virginia restrictive in its effect so that the legislature was without power to enact the statute, Acts 1916, p. 215, except with respect to the provisions of such statute which concern merely the "*manufacture and sale of intoxicating liquors*"—those portions of the statute prohibiting other acts than such manufacture and sale being, in such view of the statute, in conflict with said section 62 of the Constitution and void?

This question being answered in the negative, the case involves the following further questions concerning the exercise by the legislature of its constitutional powers, namely:

2. Is the form of the indictment prescribed by section 7 of the act sufficiently specific—does it descend from the genus to the species, from the general to the specific allegations of the particulars of the acts charged, sufficiently to inform the accused of "the cause and nature of his accusation," so as to comply with the requirements of section 8 of the Constitution of Virginia?

3. Has the trial court any longer the discretion it formerly had, on motion of the accused, to require the Commonwealth, on the trial of the case, after it has introduced its evidence in chief, to elect on the charge of what offense, or offenses, it will ask the conviction?

These questions will be considered in their order as above stated.

1. With respect to question 1:

Upon the authorities referred to, and for the reasons

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stated in the majority opinion, the first question above must be answered in the negative, and I fully concur in such opinion on this point.

2. With respect to question 2:

The indictment in question is in the form prescribed by section 7 of the act, is for first offenses *under section 3* of the act only, and under it the same punishment for each offense is prescribed, namely, the accused may be fined (for each offense) not less than fifty dollars nor more than five hundred dollars and be confined in jail not less than one nor more than six months." See sections 3, 5 and 7 of Acts 1916, p. 216.

Omitting the formal parts, the indictment in the instant case was as follows:

"That John Pine and Sarah Scott, within the four days next prior to the finding of this indictment, in the said city of Roanoke, Virginia, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits."

The indictment charges the statutory offenses therein set forth in the language of section 3 of the statute which creates the offenses.

So far as the charges of the respective offenses in the indictment are concerned (laying aside for the present the consideration of the charges of the offenses being all contained in one count), the following may be said:

It is firmly settled in this State, in effect, by a long line of decisions, that (so far as the sufficiency of the charges themselves is concerned) the indictment, prior to the statute in question, would have been good and would have been sufficient to meet the requirements of section 8 of the Constitution of Virginia. *Fletcher's Case*, 106 Va. 840, 56 S. E. 149; *Rose's Case*, 106 Va. 850, 56 S. E. 151; *White's Case*, 107 Va. 901, 59 S. E. 1101; *Runde's Case*, 108 Va. 873, 61 S. E. 792; *Clopton's Case*, 109 Va. 813, 63 S. E.

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1022; *Dix's Case*, 110 Va. 907, 67 S. E. 344; *Ferrimer's Case*, 112 Va. 897, 72 S. E. 699; *Shiflett's Case*, 114 Va. 876, 77 S. E. 606.

The effect of the majority opinion is, as I think, to overrule all of these cases.

In *White's Case*, *supra*; *Arrington's Case*, 87 Va. 96, 2 S. E. 224, 10 L. R. A. 242, and also *Head's Case*, 11 Gratt. (52 Va.) 819, referred to in the majority opinion, are distinguished.

As stated by Judge Buchanan, in delivering the opinion of this court in *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 677: "Because of the difficulty the Commonwealth has in prosecuting offenses of this kind, or for some other reason, there has been in this class of cases some relaxation of the strict rules as to pleading and the introduction of evidence which generally prevail in criminal cases." And before the prohibition statute in question was enacted, the rule adopted in this State on this subject (which, however, is the same rule in principle generally prevailing everywhere and as to all crimes [1 Bish. Cr. Pr., sections 81, 82], is that, in such classes of cases, only the acts and circumstances *which are of the essence* of the statutory offense, or offenses, charged, (*i. e.*, which are the essential ingredients thereof), need be set forth in the indictment.

The result of the decisions above cited is that it has been long established in Virginia by the decisions of this court, that the charge of statutory offenses of this character in the language of the statute creating them includes all that is *of the essence* of the offense, or offenses, except the laying of the venue and an allegation bringing the case within the period of limitation for the prosecution prescribed by the statute. To illustrate: These decisions hold that *the place* of the commission of such offenses need not be alleged, save the allegation of the county or city over which the trial court has jurisdiction; nor *the time*, save

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the general allegation that the offense, or offenses, was, or were, committed "within twelve months last past" (that being the statutory period of limitation); nor *the person or persons*, other than the accused, *concerned in the offense*—as the person or persons to whom ardent spirits were unlawfully sold; nor that the act charged was done unlawfully, or the like. All these and other circumstances than the two involving the laying of the venue and bringing the charges within the statutory period of limitation, not being of the essence of the statutory offenses, are not necessary to be specifically charged to meet the requirements of section 8 of the Constitution of Virginia aforesaid. In other words, that in such cases an indictment in the language of the statute creating an offense, with the added allegations to the effect that the offense was committed in the county (or city) having jurisdiction of the trial of it, and that it was committed "within one year" (where the statute, as in the instant case, prescribes that period of limitation) is sufficient to meet such constitutional requirement.

This holding is sound, too, on principle.

What is said in the majority opinion and quoted from various cases, on the subject of an indictment in the language of a statute being insufficient to inform the accused of the cause and nature of the accusation against him, is true in general terms. But where the offense is *malum prohibitum* only, and the statute *designates the acts, which it creates into an offense or offenses*, the nature and cause of the offense are charged with sufficient particularity in the indictment by the use of the language of the statute creating it, so that no further descent into particulars is necessary therein.

The cases of *United States v. Cruikshank*, 92 U. S. 543, 23 L. Ed. 588, and *State v. Terry*, 109 Mo. 601, 19 S. W. 206, cited and especially relied on in the majority opinion, do not involve the question under consideration, namely,

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whether, where a statute makes a definite act or acts named therein an offense or offenses (as is true of the statute before us in the instant case), an indictment following the language of the statute complies with the constitutional requirement in question so as to inform the accused of the nature and cause of his accusation? These cases indeed admit that the rule is that an indictment in the language of the statute is sufficient to comply with this constitutional requirement where "the statute describes the whole offense and the indictment charges the crime in the words of the statute." *State v. Terry*, at p. 601 of 109 Mo., at p. 206 of 19 S. W., quoting from C. J. Shaw's opinion in *Tully v. Com.*, 4 Metc. (Mass.) 358. See, also, *United States v. Cruikshank*, at pp. 548-9, 557, of 92 U. S., 23 L. Ed. 588. The whole of this very quotation, indeed, correctly points out the precise distinction between the cases where the charge of the offense in the language of the statute creating it is not sufficient to comply with the constitutional requirement as to giving notice of the cause and nature of the accusation, and the cases where such charge is sufficient to comply with such constitutional requirement. The whole quotation referred to is as follows: Where a statute punishes an offense by its legal designation, *without enumerating the acts which constitute it*, then it is necessary to use the terms which technically charge the offense named at common law. But we think this is not necessary where *the statute describes the whole offense* and the indictment charges the crime *in the words of the statute*." The same opinion then proceeds with the following quotation from Whart. Cr. Pl. & Pr., section 220: "On general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far *individuates* the offense that the offender has proper notice, from the mere adoption of the statutory

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terms, what the offense he is to be tried for really is." (Italics supplied).

The statute so far *individuates* the offense when it, itself, designates *the acts* which it enacts shall constitute the offense or offenses created thereby.

In *United States v. Cruikshank*, *supra*, the indictment was for conspiracy under the 6th section of the act of Congress of May 31, 1870, known as the enforcement act (16 U. S. Stat. 140, C. 114 [Comp. St. 1916, section 10183]), by which the offenses created thereby are made to consist in *the unlawful combination, with an intent* to prevent the enjoyment of any right granted or secured by the United States Constitution, etc. All rights are not so granted or secured. Whether one is so or not was a question of law to be decided by the court. The statute did not describe the whole offense—name the acts which would constitute the offense. Hence, the court held that the indictment should state the particulars to inform the court as well as the accused of the nature and cause of the accusation. There the particulars *not covered by the allegations in the language of the statute* were of the essence, or were essential ingredients of the offense.

In *State v. Terry*, 109 Mo. 601, 19 S. E. 206, the indictment was for an attempt to obtain money by fraud, in the form prescribed by statute for such an indictment. This form did not contain a description of the money, or the means used to obtain it. The court held that the two things last named were essential ingredients of the offense charged, were not covered by the allegations of the indictment, and, although the form of the indictment was as prescribed by statute, that statute was itself unconstitutional, in that it did not require all of the essential ingredients of the offense to be charged in the indictment.

These, therefore, were very different cases from one such as the instant case, where the statute itself under which it

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was found provides that certain acts therein named shall themselves constitute, respectively, the several offenses thereby created, and sets forth the prohibited acts which are made such offenses by the statute.

Independent of authority elsewhere, however, the rule in Virginia on the subject has been firmly settled, as aforesaid, by the long line of decisions of this court above cited.

The majority opinion enumerates some of the acts designated by the statute in question as offenses under the statute, to-wit: (1) to transport for sale; (2) to advertise for sale; (3) to aid in procuring ardent spirits, and (4) to act as agent or employee in certain instances, as not sufficiently charged in the indictment. The last two acts named are not charged in the indictment in the instant case following the form of section 7 of the statute. Reference will be hereinafter made to the subject of the first named acts. I am unable to perceive why the charge in an indictment, that the accused did "advertise for sale * * * ardent spirits," (the offense of advertising under section 3 of the act) is not as much a sufficient allegation of that act as the allegation that he did "manufacture," or "sell," or "offer, keep, store and expose for sale," "give away," "dispense," "solicit and receive orders for ardent spirits." All of the latter allegations, being in the language of the statute creating offenses of such acts, respectively, have been held (expressly as to some and by necessary inference as to others) by the long line of Virginia decisions aforesaid to be sufficient to comply with the constitutional requirement on the subject. The indictment put in issue the ultimate question of facts of whether the accused did "advertise for sale ardent spirits," and in the case of advertising, prohibited by section 3 of the act, as in the cases of the other acts charged in the indictment, the latter put in issue the ultimate questions of fact, whether the respective acts charged were done by the accused. The circumstances attending

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and the various details of the action going to make up and constitute the ultimate acts prohibited by the statute are mere matters of evidence, equally in all such cases, and are not necessary to be charged in the pleading (the indictment).

Hence, with respect to the character of offenses we are considering, charged in the indictment in the instant case, the precise point is this, the indictment need not use other language than the statutory language creating the offense—need not descend to other particulars in the charge of the commission of the offenses—except to lay the venue and bring the cause within the statutory period of limitation upon the prosecution.

The form of indictment prescribed by section 7 of the act fulfills these requirements. So does the indictment in the instant case. The latter charges the precise date on which the offenses charged are alleged to have been committed, although that particularity was unnecessary, as aforesaid, and lays the venue.

I cannot arrive at any other conclusion, therefore, than that the indictment in the instant case is sufficient to meet the requirements of section 8 of the Constitution of Virginia.

Hence, under the firmly settled rule aforesaid, established before the statute in question was enacted, so far as the particulars of the offenses charged in the indictment are concerned, the indictment itself gave to the accused all the information necessary for the preparation of his defense which the Constitution requires; and, therefore, the indictment needed no bill of particulars to aid it.

Indeed, if the practice of requiring a bill of particulars to be furnished in criminal cases, heretofore unused in Virginia, were adopted by us in practice, if that practice were made to accord with it as prevailing elsewhere (as indeed is noted in the majority opinion), it would not be manda-

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tory upon, but would rest merely in the, sound discretion of the trial court, to require a bill of particulars in certain cases. This would not, in all cases, aid the indictment in the matter of particularity of its allegations—of its descent from the general to specific allegations. And it would open up a wide field of judicial uncertainty as to when the court should exercise its discretion to require a bill of particulars to aid the indictment in complying with the constitutional requirement aforesaid. The majority opinion suggests that the practice of requiring a bill of particulars in such case be adopted with this addition to the practice, namely, that its requirement be made mandatory in certain cases. This would be something new in procedure never prevailing as a hard and fast rule at common law. 1 Bishop on Cr. Pr., section 533 and section 454. And if the latter rule were adopted it would be in effect but a requirement that the indictment be more specific in its charges of the offenses in question than has been the practice heretofore in Virginia. The change in practice would accomplish nothing new or beneficial in effect. If an indictment is insufficient to comply with the requirements of section 8 of the Virginia Constitution, the question can be raised as well by motion to quash the indictment under our established practice as by a motion for a bill of particulars to aid the indictment. With all due deference, therefore, I am of opinion that there is no need for any change of practice on the subject; and I think, moreover, that such change would open a Pandora's box of uncertainties about matters which have been long set at rest by the decisions of this court.

The majority opinion, while saving that the indictment is sufficient under section 8 of the Virginia Constitution, yet holds it insufficient unless aided by a bill of particulars. The opinion holds that the indictment is sufficient *on demurrer only* and because the constitutional requirement is

not that the needed information must be furnished by *an indictment*, and hence that it may be furnished in some other way, namely, by a bill of particulars; and that the court, by changing the practice in Virginia so as to require a bill of particulars in such case in aid of the indictment, can supply the constitutional requirement in question. With the utmost deference, it seems clear to me that in making such requirement the court is adding a requirement not in the statute, and to that extent it is modifying and changing (and, in effect repealing) the statute. There is no statute or rule of practice heretofore existing in Virginia providing for a bill of particulars in criminal cases. Hence, the legislature, by the act in question, has, in effect, said that the indictment in the form in which it is in the instant case is sufficient in itself to inform the accused of the cause and nature of his accusation, without the aid of anything else whatsoever. To hold otherwise is to abolish this rule everywhere established, in doing so to overrule the long line of decisions in Virginia on the subject, and, further, in effect to repeal the statute under consideration, *pro tanto*.

I am not opposing the idea that the requirement of a bill of particulars in criminal cases, as in civil cases, would be in aid of the accused, in that it would lessen the burden otherwise resting upon him of coming to trial prepared to make his defense *in all particulars* against the charges against him *put in issue* by the indictment, or that the appeal might not be very strong to the legislature to provide for such aid being extended to the accused in some criminal cases; but it seems to me that it is significant that the legislature has never so provided, and further that our courts have never put such a practice into effect in any criminal case. And on an appeal to the legislature to enact such a provision, if made, I can understand how the legislature might regard the Commonwealth in prosecuting the statu-

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tory offenses under consideration as not standing in the same position as to possession of information before trial of particulars touching the commission of the offense or offenses put in issue as is the plaintiff in a civil case touching the particulars of his own cause of action, they being naturally within his own knowledge. Hence, I can understand how the legislature might hesitate to require the same particularity of statement of the Commonwealth in such cases as is required (by statute in Virginia) of a plaintiff in civil cases, by bill of particulars, and how such requirement might result in serious and undue embarrassment of the former in enforcing the statute creating such offenses, and how the legislature might decline to extend such aid to the accused in such cases; as indeed it has declined to do by enacting, as it has done by the statute in question, that the indictment in question is sufficient as aforesaid. If this is a hardship upon the accused in such cases, it is a hardship imposed by the legislature, which, if not inhibited by the Constitution, the courts are powerless to relieve against.

Hence, the question involved in the proposition, that the court shall inaugurate the practice of requiring a bill of particulars in cases of the character under consideration, in turn involves, after all, the ultimate question, whether the statute in enacting, in effect, that an indictment charging the offenses as they are charged in the instant case, is in violation of section 8 of the Constitution of Virginia? As we have seen above, such question must, as I feel, be answered in the negative and in favor of the sufficiency of such an indictment.

It is true, as noted in the majority opinion, that section 7 of the said statute omits the charge of the offense of *transporting* ardent spirits for sale from the form of indictment thereby prescribed. This was a manifest clerical omission. Its effect is, clearly, only that, under an indictment follow-

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ing the form of such section of the statute, no evidence of transporting ardent spirits for sale would be admissible, if objected to, and in such case, unless the indictment was properly amended, there could be no conviction thereunder of the offense of transporting ardent spirits for sale. No such evidence was offered or admitted in the instant case, and so this point does not arise therein.

It results from the foregoing considerations, that the only change which section 7 of said act has made in the law, as it was aforesaid, is to allow, in the charge of an offense or offenses under the statute, all of the offenses created by sections 3, 4 and 5 thereof, to be charged in one indictment.

As correctly pointed out in the majority opinion, if the indictment is sufficiently specific in its charges to be valid under section 8 of the Constitution of Virginia (and the act is not in contravention of section 62 of the Virginia Constitution), the power of the legislature to provide such form of indictment is plenary and the indictment is good. As we have above seen, the indictment does not contravene section 8, and the majority opinion agrees that it does not contravene section 62, aforesaid.

The conclusion necessarily follows that upon such an indictment as that in the instant case, the accused is put upon his defense of all of the offenses charged in the indictment and must come to trial prepared to defend against all of such charges.

From the standpoint of the accused, the hardship and danger of injustice resulting from such a requirement as that mentioned in the last above paragraph is more theoretical than real. It is, in truth, less burdensome in loss of time and expense to the accused to meet a number of charges in one trial than in a number of separate trials. The accused has to bring his witnesses to meet all of the charges upon which he is in fact indicted, either in several.

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or in one trial. The punishment prescribed by the statute for several offenses of which the accused may be found guilty in one trial is no greater than if there were several trials, and, in practice, it is a matter of common knowledge that the aggregate of punishment inflicted by the verdict of one jury in a single trial is apt to be less than of several different juries in separate and distinct trials. And if there be any hardship in the requirement that the accused must come to the trial prepared to defend against a number of charges in the indictment in one trial, since there is no infringement of his constitutional guarantees and the power of the legislature is plenary on the subject, to the extent it has gone in the enactment in question, as stated in substance above, the courts are powerless to afford the accused any remedy. The legislature has spoken on a subject left by the Constitution, and wisely left, I think, in its discretion. It is not within the province of the courts to interfere with that exercise of this legislative function. But—

Touching the foregoing subject, and with respect to misdemeanors, as stated by Mr. Bishop, 1 Bishop Cr. Pr. (4th ed.), sec. 458: “* * * the doctrine of the English and most American courts is * * * that if a man has been engaged in a course of unlawful conduct resulting in a hundred legally distinct petty offenses, and the executive officers of the government have determined to exercise their right, *not controllable by the judiciary*, to bring him to trial for all, it is a piece of sheer oppression to him to compel them to find against him a hundred indictments, and require him to stand his trial a hundred times, instead of answering to all at once. Moreover, on broader views, some deem, the author submits rightly, that the joining in proper cases of distinct misdemeanors in one indictment, followed by their trial at one hearing before the petit jury, and the punishment of each as though on a separate indictment, are

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essential to the administration of real justice—in some cases essential as protecting the accused from the overburden of needless trials, in others as saving the courts from being blocked by them to the utter suppression of public justice.” (Italics supplied.) See also the note of Mr. Bishop (*Idem*), p. 258, on *Tweed Case*, where there were charges of four hundred and twenty offenses for violation of a statute in one indictment.

Hence, question two above must be answered, I think, in the affirmative.

3. Coming now to the consideration of question three above, concerning the right of the accused to have the Commonwealth elect in such a case as that at bar.

In felony cases as a general rule, subject to a few exceptions not material to be noted here, there can be but one conviction of a felony under one indictment, although in the discretion of the trial court, several separate felonies may be allowed to be charged therein, if in several counts, a separate count for each offense. Hence, the right of the accused to have the Commonwealth make the election aforesaid on the trial of the case always exists in all felony cases, except in the few instances where there may be more than one conviction under one indictment. *Dowdy's Case*, *supra*; *Lazier's Case*, 10 Gratt. (51 Va.) 708; *Anthony's Case*, 88 Va. 847, 14 S. E. 834; *Johnson's Case*, 102 Va. 927, 46 S. E. 789; *Kane v. People*, 8 Wend. (N. Y.) 211; *Mitchell's Case*, 93 Va. 775, 20 S. E. 892.

In misdemeanor cases the rule is different. Prior to the prohibition statute we have under consideration, there might be more than one conviction of different misdemeanors under one indictment. From very early times, it has been universally held that, where the misdemeanors are of the same general nature and their punishment is the same (or, indeed, where the punishment is similar), when the mode of trial is the same and the convenience of the court or the

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due administration of public justice does not require separate trials, there may be as many convictions of several different misdemeanors in one trial under one indictment as there are separate counts in the indictment charging them; and that *only* where there is *but one count* in the indictment in a misdemeanor case, which charges several of *such* different misdemeanors, does the rule apply that there can be but one conviction, in the one trial, of one misdemeanor. 1 Bishop Cr. Pr. (4th ed.), secs. 457, 458, 459, 460, 452; *Pointer v. U. S.*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208, citing 1 Chitty's Cr. Law, pp. 252-3, and Archibald (8th ed.), chap. 3, p. 95. See also to same effect *Young v. The King*, 3 T. R. 106; *Dowdy's Case*, *supra*; *Benton's Case*, 91 Va. 782, 21 S. E. 495; *Mitchell's Case*, *supra*; *Lewis' Case*, 90 Va. 843, 20 S. E. 777; *Fletcher's Case*, *supra*; *Peer's Case*, 5 Gratt. (46 Va.) 874.

Therefore the doctrine of the right of the accused to have the Commonwealth elect on which charge or charges in the indictment it will ask conviction, before the prohibition statute under consideration was enacted, was uniformly applied in misdemeanor cases *only* where there could not be conviction of all the offenses charged in the indictment in the one trial. And the settled rule was that there could be only one conviction of one offense in one trial in misdemeanor cases only where, either (1) there is but one count in the indictment (*Hatcher & Shaw's Case*, *supra*; *Dix's Case*, *supra*, in which there was only one count in the indictment), or (2) where it is made to appear to the trial court that the accused would be "injured in his defense by the joinder" (of several distinct misdemeanors, different in their nature and in their punishment or mode of trial), "or for its (the court's) own convenience, or to conserve the administration of public justice," such joinder should not be allowed in one trial. (1 Bish. Cr. Pr., secs. 452, 453.)

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Mr. Bishop says, in 1 Bish. Cr. Pr., sec. 452: "By the practice everywhere, distinct misdemeanors may be joined in separate counts of one indictment, to be followed by one trial for all, and by conviction for each, the same as though all were charged in separate indictments; subject to practical limitations from judicial discretion. Thus, * * * in liquor-selling, when made by statute a misdemeanor, with a fine for each sale, several counts for distinct sales may be combined in one indictment, and the accumulated penalty imposed." (See also the quotation from 1 Bish. Cr. Pr., sec. 458, above.) Mr. Bishop adds (*Idem*, sec. 453): "As limiting this doctrine—the court, to protect the defendant from being injured in his defense by the joinder, or for its own convenience, or to conserve the due administration of public justice, will on application quash a part of the counts or *put the prosecutor to elect, or otherwise*, as and if the judicial discretion indicates. Therefore * * * the joinder will be thus restrained if the offenses are of *different natures*, or especially if the punishments are not the same * * * " (Italics supplied.)

Hence, touching the rule (2) above referred to, by which the judicial discretion of the trial court is guided (independent of statute), in not allowing the joinder of different offenses in misdemeanor cases, clearly, as shown by the authorities, the number of such offenses, or that the offenses are "*widely separated by time, place and circumstances*," are not grounds upon which the judicial discretion to apply such rule can be invoked. (1 Bish. Cr. Pr., secs. 452, 458.) I am constrained, therefore, to the view that the majority opinion, in laying down a contrary rule, is suggesting a new proposition, unknown to the law heretofore. The rule laid down by Mr. Bishop was the established practice in Virginia, independent of the aid of any statute. In *Mitchell's Case*, *supra*, it is said: "In the case, however, of misdemeanors, which are punishable by fine and imprisonment,

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the prosecutor is permitted to join and try several distinct offenses in the same indictment and without being required to elect on which charge he will proceed." In *Peer's Case*, *supra*, it was held that there might be a trial of the charges in one indictment in two separate counts of two separate offenses of illegal sales of ardent spirits to two different persons. In *Lewis' Case*, the one indictment contained ten counts, each charging a sale to a different person, which constituted separate and distinct offenses. There was a demurrer to the indictment in the trial court, which was overruled. There was a conviction for three of the offenses charged, three fines of \$100.00 each imposed, and a sentence of thirty days' imprisonment in the county jail. This court, in its opinion delivered by Hinton, J., said: "The counts are couched in the usual formal language adopted in such cases, and advised the defendant fully of the specific charges he was called upon to answer, and the demurrers thereto were properly overruled." The convictions were sustained by the court. Similarly, in *Fletcher's Case*, *supra*, the accused, in one trial, under one indictment, which charged "within twelve months last passed" fifteen different sales of ardent spirits to fifteen different persons named, and a sixteenth sale without naming any person to whom it was made, was convicted of the sixteen different offenses charged (which must have been committed at different times) and the fines aggregated the sum of \$3,200. It is true no objection seems to have been made by the accused to being charged with and tried for the several different offenses in one trial under one indictment, but he could have made no such valid objection after the decisions of this court in *Peer's Case*, *supra*, where such precise objection was unsuccessfully made, and *Lewis' Case*, *supra*, where the precise objection was not made, but where there was a demurrer to the indictment which had the effect of presenting of record to the appellate court the defect in the in-

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dictment, if one existed; and counsel in the case and this court evidently considered the practice settled and not open to valid objection. *Peer's Case*, *Lewis' Case* and *Fletcher's Case*, therefore, show what was the established practice on the subject in this State prior to the prohibition statute in question, certainly with respect to distinct offenses consisting of different sales of ardent spirits being charged and conviction therefor being had in one trial. [As above noted, in *White's Case*, *supra*, and subsequent cases in this State, it is held, under a statute such as the prohibition act in question, making the statutory offenses created thereby such offenses if they occur *anywhere* in the State, or *with any person* whatsoever, that allegations of the *place* of the commission of the offenses (other than the laying of the venue), and of any *person* connected with the commission of the offense (other than the accused—as of the person or persons to whom illegal sale or sales is or are made), are unnecessary.]

Now concerning joinder (independent of a statute authorizing it) of the other offenses created by section 3 of the act, with charges of illegal sales, in one indictment followed by the trial and conviction of all of them in one trial: As we have seen above, the general rule prevailing in the English and most American courts is, that where a course of unlawful conduct is charged (as in the indictment in the instant case) in violation of a statute, an unlimited number of petty offenses (misdemeanors), resulting from any such conduct, may be properly joined in one indictment and one trial. 1 Bish. Cr. Pr., sec. 458. It is not apparent, as an abstract proposition, that it would be more injurious to the accused to have to defend in one trial a charge of illegal manufacturing, joined with a charge of illegal selling of ardent spirits, or several of either, in violation of the same statute, than so to defend a number of charges of such different sales only, *widely separated in*

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time and place. And so as to the other statutory offenses under section 3 of the act. If, however, it were made to appear to the trial court that, because of peculiar circumstances or situation of the accused, such joinder of offenses in one indictment and trial *would in fact* injure his defense, undoubtedly (independent of statute authorizing such joinder) the trial court would have the discretion, on motion to quash, or on motion to have the Commonwealth elect as aforesaid, to give the proper relief to the accused. But even in such case the peculiar situation aforesaid must be made to appear to the trial court, by the motion or otherwise, before it could be required to exercise its discretion aforesaid in the matter, and before this appellate court could be asked to review and reverse the action of the trial court on the subject. This was not done in the instant case.

Further: Touching the rule (2), above referred to, by which the judicial discretion of the trial court is guided (independent of statute) in not allowing the joinder of different offenses in misdemeanor cases, where "the punishments are not the same." As we have seen above, the indictment in the instant case is for first offenses under section 3 of the act, and the punishment for each offense charged in the indictment are, under section 5 of the act, the same.

Now section 7 of the prohibition statute, in the view I take of it, did not go beyond allowing to be charged in one count of the indictment the several different offenses which, under the established practice in this State prior thereto, might have been properly charged therein under separate counts, and allowing the several convictions to follow accordingly in the one trial. In this matter also, therefore, the statute under consideration merely adopted and made statutory the rule on the subject already settled by this court, with the sole modification that the statute applies the rule to an indictment containing the several charges in only one count.

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But, if this were not so, clearly the statute allows **the joinder of the charges named in section 7 of the statute, in one count of the one indictment, and, as a statutory rule of procedure, it is valid, even if it changes the common law rule on the subject, since it infringes, as we have above seen, on no constitutional limitation of the legislative power of enactment in this behalf. Moreover, the statute on this point being constitutional, it took away the judicial discretion aforesaid theretofore existing to disallow joinder in one trial of separate offenses differing in their nature, to the extent of those named in section 7 of the act, expressly thereby allowed to be joined. As to the joinder of such offenses as are there named, the legislature has spoken, in the exercise of its discretion, and the statutory enactment has superseded the judicial discretion theretofore existing.**

That this is true will even more clearly appear from the following further considerations:

The doctrine of the election aforesaid was applied to misdemeanor cases of the character of the instant case, for the reasons so lucidly expressed by Judge Buchanan in the leading case on this subject aforesaid (*Hatcher & Shaw's Case*, 106 Va., at pp. 830-1, 55 S. E. 677). Such reasons apply only to a case where there cannot be conviction in the one trial of all the offenses charged in the indictment. (In that case there could be but one conviction as the law then stood, because there was but one count in the declaration.) To cases in which, in one trial, there cannot be conviction of all of the offenses charged, such reasons are properly applicable. But not so as to a case where there can be conviction in the one trial of all the offenses charged. If in a case where there can be more than one conviction, the Commonwealth may be compelled to elect one offense charged, or two, or three, or any number of such offenses, for which it will ask for conviction, less in number than all of the of-

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fenses charged in the indictment, manifestly the Commonwealth may thereby be deprived of its right to try and convict the accused of *all* of the offenses charged, and properly charged, in the indictment. If the rule were construed to mean that the Commonwealth *may elect* to rely upon *all* of the offenses charged for which it will ask conviction, this rule would amount to nothing; the whole matter would be left, after all, in the discretion of the Commonwealth's attorney. There, indeed, it is left, and, I think, properly left by the statute in question. It could not be otherwise without depriving the Commonwealth of its well settled right, without the aid of said statute, to prosecute, try and convict the accused, in one trial, if it chooses and can prove his guilt, of a number of separate and distinct misdemeanors, provided the indictment therefor is found by a grand jury and is in legal form, and contains only charges of offenses of which there may be conviction of all in one trial, and, since the statute clearly confers such a right on the Commonwealth, a different rule of practice would repeal the statute on this subject.

In regard to the point urged for the accused in the instant case, that for the offense of "advertising" charged in the indictment, a different mode of trial is prescribed by section 19 of the act than is prescribed for the offenses created by section 3 of the act, and that for this reason such offense cannot be joined with the other offenses charged in the indictment. It is true that (independent of statute) where *the mode of trial* is not the same, there can be non-joinder of the offenses in the same indictment (1 Bisch. Cr. Pr., section 453); but under the rules applicable to the construction of statutes, section 19 of the act must be held to refer to advertising by methods specified in that section, and section 3 to advertising in some method other than those specified in section 19 aforesaid. This relieves the court from the consideration in the instant case, of

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whether the statute permits misdemeanors to be joined in one indictment which have prescribed for them a different mode of trials, and whether such a change of the common law rule on the subject would be unconstitutional.

It may be proper to add that the majority opinion seems to consider the procedure by motion of the accused to have the Commonwealth elect as aforesaid as in aid of the indictment in the lack of sufficient specifications in its charges to inform the accused of the "cause and nature of his accusation" to enable the latter to prepare his defense. Such motion is wholly unsuited to serve such a purpose. It comes too late therefor. It is settled that it is properly to be entertained by the court only after the Commonwealth has closed its introduction of evidence in chief, *Hatcher & Shaw's Case, supra*. It is manifestly then too late for the Commonwealth to furnish the accused with specifications of "the cause and nature of his accusation," to comply with that constitutional requirement, or aid in complying with it, in any true sense, or substantial way.

The use of the motion in practice has been a wholly different one. Where there cannot be conviction in the one trial of all of the offenses charged in the indictment, the accused is informed on what charge or charges the conviction which can be had is asked. Thus time and expense to the accused is saved in rendering it unnecessary for the latter to offer evidence to meet other charges and the mind of the jury is brought to the consideration of a single offense. *Hatcher & Shaw's Case, supra*. These are important results, but, aside from the impracticability of their attainment without unduly taking away the rights of the Commonwealth, aforesaid, in cases where there may be conviction in a single trial of all of the offenses charged, above noted, they are objects entirely different from that of having the accused notified, in time to prepare his defense, of what charges he must come to trial prepared to meet. Hav-

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ing, upon his coming to trial, prepared himself to meet *all* of the charges, as he must do, if he acts wisely under the procedure of the motion to elect, that procedure could in no case, even under the practice prevailing before the prohibition statute, in any degree relieve the accused of that burden. The motion to elect, therefore, could never, in our practice, have taken the place of a bill of particulars, or have aided an indictment in its lack of proper specific allegation of the particulars of the offense charged, for the purpose for which such specific allegations are said to be needed. The motion to quash, however, would serve this purpose. By the latter motion the accused can obtain such particularity in specific allegations of the indictment as may be required by the Constitution or otherwise by law.

In regard to the point urged in the petition that the verdict should have specified of which of the offenses charged in the indictment the jury found the accused guilty, because otherwise the verdict is no protection against future prosecutions, it should be said that, all of the offenses charged in the indictment having been properly charged, the accused, by the trial thereunder, has been put once in jeopardy for all of those offenses committed "within twelve months last past" next preceding the indictment, and can plead *autrefois convict* or *autrefois acquit* in bar of any subsequent prosecution for any and all of such offenses within such period.

In connection with all of the foregoing views and conclusions, it is assumed that the grand jury, in the instant case, in fact found a true bill against the accused for all of the several offenses charged in the indictment. It is elementary law that the accused could not be put to trial for any of such offenses for which he was not indicted, where the statute, as in the instant case, requires the procedure by indictment. The indictment is the safeguard provided by the statute to save the accused from unfounded charges. To illustrate: If it be true that the grand jury in fact

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found a true bill against the accused for only one of the offenses charged in the indictment, or two, or any number less than the whole number of offenses so charged, and yet left, in the form of indictment as prepared and sent in to the grand jury by the Commonwealth's attorney, another charge, or other charges, of offenses as to which they did not find a true bill, it is manifest that they went beyond what the true construction of section 7 of the statute aforesaid authorizes. Necessarily, the true construction of such section is that the grand jury may use the form thereby prescribed in its statement of the several offenses therein named to the extent that a true bill is found by them with respect to the charge or charges of the commission by the accused of such offenses, and no further. Otherwise, as indicated above, the statute would be construed to authorize the trial of the accused upon charges upon which there has been no indictment of him by a grand jury.

This indeed would be a hardship—is in truth the chief hardship of which the accused complains in the instant case—and, if it appeared of record to exist in such case, the judgment should be unhesitatingly reversed. But the indictment in the instant case does not merely follow the form of the indictment provided for in section 7 of the act; it does not contain the charges of all the offenses therein named. This is some indication that the grand jury, in the instant case, found a true bill as to all of the offenses in fact charged in the indictment. However, after indictment found and the grand jury is discharged, their proceedings in this particular cannot be inquired into. The trial court, indeed, before the discharge of the grand jury, has the whole matter under its control. It may, by polling the grand jury and inquiry as to what charges stated in the indictment they have found a true bill, ascertain that fact and eliminate any chance of charges being left in the form of the indictment as drawn and retained therein as charges as to which a true bill is found, when in fact no true bill

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is found with respect thereto. In view of the danger of such error occurring, it would be the better practice for the trial court, upon its own motion, to adopt this procedure in dealing with indictments under said section 7. If it does not, the accused, if present when the indictment is presented to the trial court by the grand jury, may by motion have the trial court pursue this course of procedure. If the accused is not present, or, if present, does not make such motion, and the grand jury presents the indictment in the form in which it is in the instant case as a true bill, and is discharged, or in any case, in whatever form the grand jury, on being discharged, leaves the indictment as its presentation thereof to the trial court, such indictment, as in fact presented to such court, must be taken by the trial court and by this court to be the indictment found by a grand jury. The subject cannot be further inquired into after the grand jury has been discharged.

Manifestly, the question as to whether there is a lack of a true bill as to any of the charges stated in the indictment cannot be raised by the motion to have the Commonwealth elect on which charge, or charges, it will ask for conviction. Such question must and can be raised only in the preliminary proceedings aforesaid before the trial court, before the discharge of the grand jury.

The question under consideration not having been raised in the instant case so as to make the fact appear of record that the accused were tried for any offense or offenses for which they were not in fact indicted, I think there should be no reversal of the judgment of the trial court on such ground.

I concur in the other conclusions reached in the majority opinion on the special points arising in the instant case, and in the result of affirmance of the judgment of the court below.

For the foregoing reasons, however, I feel constrained to file this separate opinion.

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Ejectment.—Section 2734 of the Code of 1904, restricting defendants in ejectment to the plea of the general issue, refers only to pleas in bar and does not preclude pleas in abatement. *Matoaka Coal v. Clinch Valley Min.*, 522.

Non-Joinder and Misjoinder of Parties.—Where the plaintiff in actions *ex delicto* improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions *ex contractu*. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement. Consequently, defendant in ejectment under the general issue has no right to raise the question of the failure of the plaintiff to name as defendant the person actually occupying the premises. *Matoaka Coal v. Clinch Valley Min.*, 522.

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Notary Public.— See *infra*, "Who May Take."

A notary public is not liable for a loss resulting from the fact that, within his jurisdiction and in good faith, he took

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and certified a void acknowledgment to a deed. *Yates v. Ley*, 265.

In an action against a trustee in a deed of trust for a loss through the defective acknowledgment of the deed, the trial court was requested by plaintiff to instruct the jury that any negligence of plaintiff's agent, if the jury believe that he was in any way negligent, which concurred with or intervened after the negligence of defendant, should they believe him negligent under the instructions of the court, does not relieve the defendant of his liability to the plaintiff for her loss proximately caused by some negligent act of his. And even though they may believe from the evidence that the agent was negligent, and further believe from the evidence that his negligence contributed to the loss of the plaintiff, yet if the negligence of defendant was the efficient cause of the plaintiff's loss, defendant is liable. The court refused to give this instruction. Conceding that the instruction, technically and in the abstract, embodied a correct rule of law, its refusal should be regarded as harmless error, where the instructions as a whole presented the respective contentions of the parties in a full and fair manner, placing the emphasis where it belonged, and leaving no probable chance for the jury to find against the plaintiff, if they believed from the evidence that negligence of the defendant was the cause of her loss. *Yates v. Ley*, 265.

Plaintiff contended that defendant, the cashier of a bank and a notary public, was her agent in negotiating and placing a loan, and was liable for a loss occasioned by his taking the acknowledgment to a deed of trust in which he was named as trustee. Defendant introduced evidence that the transaction in question was conducted by plaintiff's nephew, a law student; that he was not plaintiff's adviser and did nothing more in negotiating the loan than to tell her nephew that he thought the property was worth the debt; that he was named as trustee without his knowledge; and, that if he had known that he was trustee he would not have known that this fact affected the validity of the acknowledgment. There was other evidence supporting defendant's position, that, if he was the plaintiff's agent or bailee in any sense at all, he was so merely in a gratuitous capacity and at most could only be held liable for gross negligence. Held: That there was ample evidence upon which to base a verdict for defendant. *Yates v. Ley*, 265.

The taking of an acknowledgment to a deed by a notary public is, under the law of Virginia, a judicial act and a

ACKNOWLEDGMENTS—Continued.**Notary Public—Continued.**

notary public is by the law of Virginia authorized to take acknowledgment to deeds of all persons appearing before him for that purpose, within the limits of the county or city for which he is appointed; and the question as to whether or not he can take a valid acknowledgment to a deed, in which he is named as trustee, is a question of law, and for an error on the part of a notary public in taking an acknowledgment as such and in good faith to any deed to which he is a party as trustee, he is not liable for damages to a party who suffers damage or loss thereby. *Yates v. Ley*, 265.

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ADEQUATE REMEDY AT LAW—Continued.**Certiorari—Continued.**

only, or in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein, the writ would have been of no value to complainant. In such case equity has jurisdiction, and the demurrer was properly overruled. *Appalachia v. Mainous*, 666.

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ADVERSE POSSESSION.

Claimant's Possession Originally Consistent with True Owner's Title.—Disclaimer.—A disclaimer or assertion of an adverse right, where possession is originally taken or held under the true owner, or by one joint tenant, tenant in common or parcener, may be presumed from a great lapse of time, with other circumstances which might warrant such presumption, and proof of the fact is not required to be so convincing as to preclude all doubt. It may be proved as any other fact involved in a civil case may be proved by circumstantial evidence, the probative value and sufficiency of the circumstantial evidence to sustain the burden of proof required (i. e., by a preponderance of the evidence), being entirely with the jury. *Baber v. Baber*, 740.

Non-residents labor under no disability with respect to the right to institute or prosecute suit at any time to assert or preserve any right of action they may have. No such right is reserved to them by statute. On the contrary when proceeded against by order of publication, etc., their rights in this respect are restricted and limited by sections 2986 and 3233 of Code of 1904. Therefore, the non-residence of one coparcener has no bearing upon the question of fact as to whether the notoriety of the disclaimer and adverse claim of right of another coparcener in possession of the land was so long continued as to affect him with constructive notice thereof, save in so far as the distance he lived from the land and the adverse occupant and claimant and his lack of communication with those who knew such facts, may affect the question. *Baber v. Baber*, 740.

ADVERSE POSSESSION—Continued.**Claimant's Possession Originally Consistent with True Owner's Title—Continued.**

The notice to or knowledge of the true owner or of the coparceners, or others originally having privity of title with the disseisor, of his disclaimer and assertion of an adverse right, required to be proved before the running of the statute of limitations will begin, need not be actual; it may be constructive. *Baber v. Baber*, 740.

Where possession is originally taken or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and assertion of an adverse right, brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be open, continuous and notorious, so as to preclude any doubt of the character of the holding or the fact of knowledge on the part of the owner. *Baber v. Baber*, 740.

Color of Title.—An instrument executed by a father and son, called a bill of bargain and sale, set forth that the father sold to the son a certain parcel of land, describing it, in consideration of one-half of the merchantable fruit on the premises, during the lifetime of the father, and that the son should furnish his mother with board and lodging during her life. Held: That this constituted a contract in writing, which, if performed on the part of the vendee, would have passed the equitable title to the land to him; and if his possession of the land was accompanied by the *bona fide* claim that he had performed his part of such contract and that he was entitled to the land thereunder, the contract gave him color of title. It is not necessary to consider the question whether the son in fact performed the contract on his part so as to have acquired a valid title to the land. The inquiry stops with the ascertainment of the fact that he accompanied his possession with the *bona fide* claim to have so done, and continued such possession unbroken for the statutory period. *Baber v. Baber*, 740.

Color of title must be by deed or will, or other *writing*, which purports or contracts to pass title, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom by the application thereto of the general rules governing the location of land conveyed by a deed. The title to which the writing gives the color, or

ADVERSE POSSESSION—Continued.**Claimant's Possession Originally Consistent with True Owner's Title—Continued.**

semblance of title, may be an equitable as well as a legal title. It is inherent in color of title that the title claimed thereunder is invalid—is in fact no title—and the writing may indeed be absolutely void; but if the other requisites of the statute of limitation are complied with by the disseisor, it will constitute color of title. *Baber v. Baber*, 740.

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The possession of one joint tenant, tenant in common or parcener, is *prima facie* the possession of his fellow, and it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster or disseisin or other act amounting to a total denial of the cotenant's right as cotenant. *Baber v. Baber*, 740.

Parcenary, Estates in.—The possession of one joint tenant, tenant in common or parcener, is *prima facie* the possession of his fellow, and it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster or disseisin or other act amounting to a total denial of the cotenant's right as cotenant. *Baber v. Baber*, 740.

See *infra*, "Claimant's Possession Originally Consistent with True Owner's Title."

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Liability of Principal for Torts of Agent.—Mere ratification is not itself a test of liability of one for the tortious act of another, much less is the receipt of a benefit from the tortious act such test, which in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification is material as bearing upon the measure of damages, but is not a true test of original liability. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment? *Henry Myers & Co. v. Lewis*, 50.

Where there is neither express authority in advance nor ratification afterwards, the test of the liability of the master or principal for the tortious act of the servant or agent, is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a nontortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the *tortious manner* in which a transaction is conducted or a service is performed by his servant or agent, entrusted by the former to the latter to be conducted or performed for him in a nontortious manner. The same is true, of course, with respect to the liability of a partnership for a tort of an individual partner. *Henry Myers & Co. v. Lewis*, 50.

AGENCY—Continued.

Notary Public.—Plaintiff contended that defendant, the cashier of a bank and a notary public, was her agent in negotiating and placing a loan, and was liable for a loss occasioned by his taking the acknowledgment to a deed of trust in which he was named as trustee. Defendant introduced evidence that the transaction in question was conducted by plaintiff's nephew, a law student; that he was not plaintiff's adviser and did nothing more in negotiating the loan than to tell her nephew that he thought the property was worth the debt; that he was named as trustee without his knowledge; and, that if he had known that he was trustee he would not have known that this fact affected the validity of the acknowledgment. There was other evidence supporting defendant's position, that, if he was the plaintiff's agent or bailee in any sense at all, he was so merely in a gratuitous capacity and at most could only be held liable for gross negligence. Held: That there was ample evidence upon which to base a verdict for defendant. *Yates v. Ley*, 265.

Notice.—Notice to an agent of a party is constructive and not actual notice to the principal. But where one claims as purchaser for value without notice, it is immaterial whether the notice was actual or constructive. *Steinman v. Clinchfield Coal Corp.*, 611.

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AGENCY—Continued.**Trusts and Trustees—Continued.**

dealing with each other as principals and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof. *Matney v. Yates*, 506.

Where it is sought to establish that an agent to purchase land is a constructive trustee of his principal, the relationship of principal and agent should be established by clear and convincing proof. *Matney v. Yates*, 506.

Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money. *Matney v. Yates*, 506.

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Amendments.—An order was entered at the August term of the lower court, reciting that an amended bill was filed by leave of court, and while the record indicated that it was not in fact filed until September following, this discrepancy, though indirectly adverted to, in the brief of counsel, was immaterial, as the amended bill was recognized and passed upon by the court at a still later term, and no objection based upon the time of filing, and no question as to identity of the amendment, appeared anywhere in the record. *Matney v. Yates*, 506.

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Conclusiveness of Verdict.—See **NEW TRIALS**.

Conflicting Evidence.—See **NEW TRIALS**.

A commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable. *Alexander v. Critcher*, 723.

Defendant contended that he had no actual knowledge of the custom or usage of the trade in question, and that it was not sufficiently certain and notorious to give rise to a presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal. *Walker v. Gateway Milling Co.*, 217.

In an action for death by wrongful act, the verdict of the jury for the plaintiff was rendered upon conflicting evidence and was approved by the trial court. From the standpoint of a demurrer to the evidence, the evidence was quite sufficient to sustain the verdict, and upon well-settled principles the Court of Appeals must accept the finding of the jury. *Virginia Iron, etc., Co. v. Prophet*, 685.

In an action of ejectment, the questions at issue were whether the plaintiff had shown the location of the land in question in a certain block of a survey, and whether defendants had shown adverse possession under color of title of the land claimed by them, or any part thereof, within an interlock, for ten years since the senior title of plaintiff accrued. As both these propositions involved jury questions,

APPEAL AND ERROR—Continued.**Conflicting Evidence—Continued.**

and both, upon highly conflicting evidence, were fairly submitted to and passed upon by the jury in favor of the plaintiff, their findings upon the facts, approved by the trial court, were beyond the cognizance of the Supreme Court of Appeals. *Sutherland v. Gent*, 643.

There is a presumption in favor of the decree of a trial court, and this presumption is entitled to especial consideration when the decree is based on uncertain and conflicting testimony. *Alexander v. Critcher*, 723.

Continuances.—A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion unless plainly erroneous. *Matoaka Coal v. Clinch Valley Min.*, 522.

Costs.—Where the appellees substantially prevailed, in an inquiry before a commissioner, there was no error in the adjudication of the court below of the costs against the appellant. *Harman v. Moss*, 399.

Criminal Law.—A denial of a constitutional right is, of itself, reversible error. *Pine v. Commonwealth*, 812.

Demurrer to the Evidence.—The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor. Accordingly, where the plaintiff assigns as error the action of the court below, first, in setting aside a verdict in his favor, and, second, in sustaining defendant's demurrer to the evidence, the appellate court will consider only the action of the court below upon the demurrer to the evidence. *Wadkins v. Damascus Lumber Co.*, 691.

Depositions.—The exclusion by the court below of a deposition of a witness is harmless, there being nothing to indicate that the commissioner did not consider the deposition in making up his report; and, the appellate court having considered it, being of the opinion that it could not in any event have properly changed the result. *Maddux v. Buchanan*, 102.

Dismissal, Discontinuance and Nonsuit.—A bill was filed by a judgment creditor against the administrator and heirs of the deceased debtor, to subject her land to the lien of the judgment. The bill alleged that the debtor owned no per-

APPEAL AND ERROR—Continued.**Dismissal, Discontinuance and Nonsuit—Continued.**

sonal property at the time of her death, out of which the judgment could be collected. The administrator and one of the heirs filed separate pleas of the statute of limitations. At the hearing the complainant asked leave to dismiss his suit as to his administrator, which motion the administrator resisted. The court, however, permitted the dismissal. Held: That the administrator was a proper party and the suit should not have been dismissed as to him. But the error in permitting complainant to dismiss as to the personal representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator. *Johnston v. Pearson*, 453.

Divorce.—In an action for divorce for adultery, the establishment of the charge of adultery depended on the testimony of two small boys, children of the parties, aged, respectively, nine and twelve years. The Supreme Court of Appeals refused to sustain an assignment of error that the court below erred in holding that the evidence was sufficient to sustain the charge of adultery. While expressing regret that children of any age, and especially those of such tender years, should be involved as witnesses in cases of this character, the court was constrained, as was the court below, upon a careful consideration of the record, to the conclusion that the testimony of these two boys was substantially true. *White v. White*, 244.

Exceptions and Objections.—Where, in an action for divorce for adultery, a note introduced in evidence alleged to have been written by the defendant, was the subject of considerable investigation and testimony in the lower court without any objection, it is too late to raise the point of admissibility upon appeal. *White v. White*, 244.

See *infra*, "Point Raised for the First Time on Appeal."

Exceptions, Bill of.—See EXCEPTIONS, BILL OF.

Final Judgments and Decrees.—A decree sustained the demurrer of one defendant to a bill and adjudged, ordered and decreed that the bill of complainants be remanded to rules to be matured as to the other defendants. At the next term, an amended bill was filed by leave of court, to which the defendant, whose demurrer had been sustained, objected on the ground that the decree was a final decree, and ended the case as to him, so that he was not affected by the leave given to

APPEAL AND ERROR—Continued.**Final Judgments and Decrees—Continued.**

file the amendment. Held: That the objection was without merit. *Matney v. Yates*, 506.

Harmless Error.—*Construction of Contract by Court.*—Although it is error for an instruction to submit to the jury the construction of a contract when it was the duty of the court to construe it, yet where the error is favorable to the plaintiffs in error and not injurious to them, it is harmless as to them. *McCorkle & Son v. Kincaid*, 546.

Dismissal, Discontinuance and Nonsuit.—A bill was filed by a judgment creditor against the administrator and heirs of the deceased debtor, to subject her land to the lien of the judgment. The bill alleged that the debtor owned no personal property at the time of her death, out of which the judgment could be collected. The administrator and one of the heirs filed separate pleas of the statute of limitations. At the hearing the complainant asked leave to dismiss his suit as to his administrator, which motion the administrator resisted. The court, however, permitted the dismissal. Held: That the administrator was a proper party and the suit should not have been dismissed as to him. But the error in permitting complainant to dismiss as to the personal representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator. *Johnston v. Pearson*, 453.

Dismissal of Petition Without Prejudice. *Gooch v. Suhor*, 35.

Exclusion of Deposition.—The exclusion by the court below of a deposition of a witness is harmless, there being nothing to indicate that the commissioner did not consider the deposition in making up his report; and, the appellate court having considered it, being of the opinion that it could not in any event have properly changed the result. *Maddux v. Buchanan*, 102.

Exemplary Damages against Partnership for Libel.—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the

APPEAL AND ERROR—Continued.**Harmless Error—Continued.****Exemplary Damages against Partnership for Libel—Continued.**

tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

General Rule.—If it does not affirmatively appear that the error in question is injurious, it must be regarded as harmless. *Henry Myers & Co. v. Lewis*, 50.

Homestead Exemption.—Where complainant under the circumstances set out in the second headnote agreed that defendant should have one-third of the profits of the resale of land purchased at a judicial sale, although there arose from the transaction a fiduciary relationship and not a mere contract of employment between complainant and defendant, complainant was not such a fiduciary as is contemplated by the statute, Code of 1904, section 3630, clause 3, which provides that the homestead exemption shall not extend to any execution or process on a demand "for liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law for money received." A recital in the decree, therefore, against complainant, "homestead exemption waived by reason of the fact that this is a fiduciary debt due" from complainant to defendant is improper, and the decree should be corrected in this respect; but the error is probably harmless, since the record not only indicates that complainant is abundantly solvent, but also that the recovery complained of is now secured by an ample supersedeas bond, so that there is no reasonable probability that his homestead will ever be attacked to satisfy the decree. *Alexander v. Critcher*, 723.

Instructions.—Conceding that the instruction, technically and in the abstract, embodied a correct rule of law, its refusal should be regarded as harmless error, where the instructions as a whole presented the respective contentions of the parties in a full and fair manner, placing the emphasis where it belonged, and leaving no probable chance for the jury to find against the plaintiff, if they believed from the evidence that negligence of the defendant was the cause of her loss. *Yates v. Ley*, 265.

Last Clear Chance.—See *infra*, "Last Clear Chance."

Homestead Exemption.—See *infra*, "Harmless Error."

Instructions.—See *infra*, "Harmless Error."

Invited Error.—Where an error of the trial court in instructing the jury as to the liability of defendants for exemplary dam-

APPEAL AND ERROR—Continued.

Invited Error—Continued.

ages was invited by an instruction asked for by the defendants and given by the court, containing the same error, and the case was tried in the court below on this point, as asked for by both parties, defendants as well as plaintiff, it is too late for the defendants to avail themselves of the error in the appellate court. *Henry Myers & Co. v. Lewis*, 50.

Judgment by Appellate Court.—Where it is evident that a new trial will not avail the plaintiff anything, the Supreme Court of Appeals will enter such judgment as the court below should have entered in favor of the defendant. *Louisville & Nashville R. Co. v. Rieley*, 469.

Last Clear Chance.—In an action for injuries to an automobile by defendant's train at a public crossing, the court instructed the jury that if they believed from the evidence that the plaintiff was guilty of contributory negligence, yet if they believed that the "defendant company knew of the plaintiff's danger, or by the exercise of ordinary care should have known of plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so." It was objected to this instruction that it imposed an absolute and unqualified duty upon the defendant to stop its train, and that it should have been qualified by the insertion of the words "by the exercise of ordinary care," or words of similar import, after the words "avoided the accident." Held: That as a legal proposition this position is correct, and the instruction should have been qualified as suggested. But upon the facts of the case it plainly appeared that this error was not prejudicial to the defendant, since with the train about 1000 feet away from the crossing when the motorman saw the plaintiff's automobile stop upon the track, the jury must have found that by the exercise of ordinary care the defendant could have stopped its train in time to have avoided the accident. *Norfolk Sou. R. Co. v. Whitehead*, 139.

Master in Chancery.—See *infra*, "Report of Commissioner."

Moot Question.—The appellee, who is the owner and occupant of a dwelling house, obtained a decree enjoining the appellant and a laundry company from maintaining a nuisance in so using the steam laundry, located within one hundred feet of the appellee's dwelling, as to cause smoke, cinders, gases, etc., to be emitted therefrom and cast over the premises of the

APPEAL AND ERROR—Continued. •**Moot Question—Continued.**

appellee. Appellant was the owner and lessor of the laundry building, and, as his co-defendant, the laundry company, had dismantled and removed the smokestack, boiler and furnace of the laundry, thus complying with the decree complained of, a motion to dismiss the appeal must be sustained, as the matter in controversy between the parties is terminated, and any opinion or decision that the Supreme Court of Appeals might deliver would be upon a moot question. *Garrett v. Smead*, 390.

Point Raised for the First Time on Appeal.—Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, plea, motion or otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time. *Pine v. Commonwealth*, 812.

An order was entered at the August term of the lower court, reciting that an amended bill was filed by leave of court, and while the record indicated that it was not in fact filed until September following, this discrepancy, though indirectly adverted to, in the brief of counsel, was immaterial, as the amended bill was recognized and passed upon by the court at a still later term, and no objection based upon the time of filing, and no question as to the identity of the amendment, appeared anywhere in the record. *Matney v. Yates*, 506.

Presumption in Favor of Decree on Conflicting Evidence.—*Alexander v. Critcher*, 723.

Presumption in Favor of Lower Court's Finding.—A decree sustained an exception to the deposition of a witness and this was assigned as error. Counsel were not agreed and the record was not clear as to the facts upon which the exception to this deposition should be disposed of, and the presumption, therefore, is that the action of the lower court was right. *Maddux v. Buchanan*, 102.

Record.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as

APPEAL AND ERROR—Continued.

Record—Continued.

much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

Report of Commissioner.—There is a strong presumption in the appellate court in favor of a decree by which the trial court has confirmed the report of a commissioner upon a question of fact. *Maddux v. Buchanan*, 102.

A commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable. *Alexander v. Critcher*, 723.

Reversible Error.—A denial of a constitutional right is, of itself, reversible error. *Pine v. Commonwealth*, 812.

Successive Trials.—The rule is that where there have been two trials the Supreme Court of Appeals must look first to the evidence and proceedings on the first trial, but where the evidence upon each of the last two trials was identical and the latter verdict the larger of the two, it follows that if there was no error to the prejudice of the plaintiff on the last trial, there could have been none on the former, even though there was a view of the premises by the jury on the former trial and not on the latter, where the judge of the trial court had the benefit of such light as the view might have shed upon the evidence, and it was clear that the final trial brought the case to the test under the most favorable possible circumstances for the plaintiff, since it gave him the benefit of the rules applicable to a demurrer to the evidence in the lower court as well as in the appellate court. *Wadkins v. Damascus Lumber Co.*, 691.

Where a trial has been had in an action at law and a verdict rendered in favor of the plaintiff, which the trial court set aside, and to which ruling the plaintiff excepted, and at the second trial the plaintiff declined to introduce any evidence and suffered a verdict to be found for the defendant, which verdict he moved to set aside and excepted to the action of the trial court overruling that motion and entering judgment for the defendant, the Supreme Court of Appeals must review the proceeding on the first trial, and if it finds that error was committed in setting aside the first verdict, it must annul all proceedings subsequent to that verdict, and render judgment thereon. *Turner v. Richmond & R. R. Co.*, 194.

Supersedeas.—A bill of conformity filed by the curator of an estate, praying the instruction and guidance of the court in

APPEAL AND ERROR—Continued.**Supersedeas—Continued.**

the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges cannot be safely disposed of except by the direction of the court, in nowise contravenes a supersedeas order in a collateral suit involving the estate. *Gooch v. Old Dominion Trust Co.*, 29.

Usages and Customs.—Defendant contended that he had no actual knowledge of the custom or usage of the trade in question, and that it was not sufficiently certain and notorious to give rise to a presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal. *Walker v. Gateway Milling Co.*, 217.

Witnesses.—The refusal of a trial court to permit a witness to answer a question will not be considered on appeal when the expected answer is not given, as the court cannot determine its materiality. *Triplett v. Second Nat. Bank*, 189.

ARBITRATION AND AWARD.

Appointment of Umpire.—An agreement to submit a controversy concerning a boundary line to arbitration, appointed two arbitrators, and provided that they should select a third. The award was signed by one of the arbitrators named in the agreement and by a third party as arbitrator. The award contained no mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evidence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission. Held: That the writing was no part of the award and was inadmissible as hearsay. *Fraley v. Nickels*, 377.

Award.—An agreement to submit a controversy concerning a boundary line to arbitration, appointed two arbitrators, and provided that they should select a third. The award was signed by one of the arbitrators named in the agreement and by a third party as arbitrator. The award contained no

ARBITRATION AND AWARD—Continued.**Award—Continued.**

mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evidence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission. Held: That the writing was no part of the award and was inadmissible as hearsay. *Fraley v. Nickels*, 377.

An arbitration agreement in writing submitted to the arbitrators a controversy concerning a boundary line. The agreement provided that the arbitrators should hear such legal evidence pertaining to title as either party might introduce before them. Held: That the fact that the arbitrators located and reported the boundary line according to an agreement of the parties instead of upon more formal evidence, did not constitute a deviation from their authority. The agreement was the most satisfactory evidence they could have had before them. *Fraley v. Nickels*, 377.

Awards are to be liberally construed to the end that they may be upheld if possible. *Fraley v. Nickels*, 377.

In the absence of some express or implied agreement to the contrary, all the arbitrators provided for in the submission of a controversy between private persons, must participate in the deliberation; and in such a case the award must be concurred in by all of them. The rule is otherwise with reference to controversies of a public nature or of public concern. *Fraley v. Nickels*, 377.

Construction of Award.—See *infra*, "Award."

Hearsay Evidence.—An agreement to submit a controversy concerning a boundary line to arbitration, appointed two arbitrators, and provided that they should select a third. The award was signed by one of the arbitrators named in the agreement and by a third party as arbitrator. The award contained no mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evi-

ARBITRATION AND AWARD—Continued.**Hearsay Evidence—Continued.**

dence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission. Held: That the writing was no part of the award and was inadmissible as hearsay. *Fraley v. Nickels*, 377.

Participation of All Arbitrators in Award.—See *infra*, "Award."

ARCHITECT. See **MECHANICS' LIENS.**

ASSIGNMENT OF ERROR.

Issue Not Made by the Pleadings.—Where the bill expressly stated that appellant was entitled to a reasonable commission or compensation for his services in a sale of timber, the issue that appellant should be denied all compensation for his services, not having been made in the pleadings or in the court below, cannot be made by assignment of error on appeal. *Harman v. Moss*, 399.

ASSIGNMENTS.

General Contractor.—Section 2482-a, Code of 1904, completely protects the owner of the building, and the case at bar fully illustrates its effectiveness as a remedy for every interested party. All that the owner has to do in case such an assignment is made is to follow the example of the owner in the instant case—pay the money into court and convene the claimants of the fund, and relieve himself of all responsibility in connection therewith. If he does not know the claimants of the fund, then he can take advantage of the statute (section 3230 of the Code of 1904) which authorizes complainants who think that there may be persons who are interested in the subject whose names are unknown, to make them parties to the suit by the general description of "parties unknown," and on proper affidavit to have them convened by order of publication. *London Bros. v. National Exchange Bank*, 460.

Section 2482-a, Code of 1904, provides that no assignment or transfer of any debt due or to become due to a general contractor by the owner for the construction or repairing of any structure for such owner, shall be valid until the claims of all subcontractors, supply men, etc., against such general contractor for labor and materials furnished in and about the construction of such structure shall have been satisfied. Held: That the language of the act was too plain to need

ASSIGNMENTS—Continued.**General Contractor—Continued.**

construction, and that its benefits could not be confined to subcontractors, material men, etc., who had perfected mechanics' liens, which in the case at bar it was admitted they could not have done because the owner of the building in question was a municipal corporation. *London Bros. v. National Exchange Bank*, 460.

Section 2482-a is not only simple and unambiguous in its language, but its purpose is lawful as well as laudable, and is plainly manifest. There is no ambiguity therein, whether considered as a separate and independent statute or in connection with the mechanics' lien statutes. Section 2482-a discourages the assignment by the general contractor of any part of the debt due or to become due him by the owner for the construction of the building, by providing that such assignment shall not be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt, unless and until, the claims of all subcontractors, supply men and laborers against such general contractor for labor performed and material furnished in and about the construction, erection and repairing of such building, shall have been satisfied. *London Bros. v. National Exchange Bank*, 460.

ASSUMPSIT. See IMPLIED CONTRACTS.

Affidavit of Defense.—Plaintiff may, either expressly or by implication, waive compliance on the part of the defendant with the requirements of section 3286 of the Code of 1904. Consenting to, or accepting without objection, a continuance of the case, are familiar methods of waiving the provisions of the statute. *Gehl v. Baker*, 23.

Section 3286 of the Code of 1904 was intended to prevent delay caused to plaintiffs by continuance upon dilatory pleas when no real defenses exist. *Gehl v. Baker*, 23.

ASSUMPTION OF RISK. See MASTER AND SERVANT.**ATTACHMENT AND GARNISHMENT.**

Motion to Quash.—The question of the validity of the debt or demand of the plaintiff, *i. e.*, whether it is or is not established does not arise upon a preliminary motion to quash the attachment, but only when the case is heard upon its merits. Consequently, the question of the liability of a partnership for torts of one of the partners is not within the scope of a motion to quash an attachment, but must be determined when the case comes up for trial on its merits. *Henry Myers & Co. v. Lewis*, 50.

Validity of Demand.— See *infra*, "Motion to Quash."

ATTORNEY AND CLIENT.

Fees of Attorney.—See **ATTORNEY'S FEES.**

ATTORNEY'S FEES.

Bills, Notes and Checks.—A provision on the face of a negotiable note for an attorney's fee for making collection is valid, subject always to the power of the court, if the fee be unreasonable in amount or unconscionable, to reduce it. *Triplett v. Second National Bank*, 189.

AUTHENTICATION. See **SERVICE OF PROCESS.**

AUTOMOBILES.

Agency.—See *infra*, "Master and Servant."

Contributory Negligence of Traveler.—Where accident occurs at crossing. *Seaboard A. L. Ry. v. Abernathy*, 173.

Crossings.—Degree of care required of traveler. *Seaboard A. L. Ry. v. Abernathy*, 173.

Damages.—In an action for damages sustained in a collision between plaintiff's Ford automobile and cars of defendant company at a crossing, the evidence was that the machine was "wrecked," and that all that was left of it was the engine and that had not been removed from the scene of the accident at the time of the trial. As the value of an engine of such an automobile, in such a condition, may be said to be almost negligible, and there was no evidence of its salvage value offered, it was not reversible error to instruct the jury that if they should find for the plaintiff, in estimating his damages, they should take into consideration the value of the automobile which was "destroyed" at the time of the collision. *Seaboard A. L. Ry. v. Abernathy*, 173.

Dangerous Machine.—An automobile is not such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous *per se*. *Blair v. Broadwater*, 301.

Master and Servant.—In an action for damages against a father by plaintiff, who was struck by an automobile owned by the father and operated by his daughter, a minor nineteen years of age, the evidence showed that the father bought and kept the car for the use and pleasure of himself and family. He was a deputy sheriff, and also used the car sometimes in the discharge of his official duties. The daughter was a careful and experienced driver, and on the day of the acci-

AUTOMOBILES—Continued.

Master and Servant—Continued.

dent she sought and obtained permission from her father to use the car that afternoon for the pleasure and entertainment of herself and her cousin. It affirmatively appeared that the daughter was not using the car on any errand or business of the father. Held: That the relationship standing alone does not render the father liable for the acts of his minor daughter; that such liability must result from the relation of master and servant or principal and agent, and the absence of that element of responsibility in this case affirmatively appears. *Blair v. Broadwater*, 301.

Negligence Per Se.—See *infra*, "Dangerous Machine."

Parent and Child.—See *infra*, "Master and Servant."

AVOIDABLE CONSEQUENCES. See DAMAGES.

AWARD. See ARBITRATION AND AWARD.

BAGGAGE. See CARRIERS.

BAILMENTS.

Gratuitous Agent or Bailee.—An agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. This is the general rule; and it is the rule applicable to the instant case. There is nothing in the evidence to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject matter of the agency. *Yates v. Ley*, 265.

BEST AND SECONDARY EVIDENCE.

Lost Instruments and Records.—A copy of an original contract, which has been lost, made by counsel and filed with the bill of one of the parties to the contract, which bill alleged that the original had been filed with the answer of the party in another suit, although not authenticated by the certificate of the clerk of the court among the records of which the original was filed at the time such copy was made, is admissible in evidence. The fact that at the time such copy was filed it was not the best evidence and valid objection might have been made in that suit to its introduction in

BEST AND SECONDARY EVIDENCE—Continued.**Lost Instruments and Records.—Continued.**

evidence, is immaterial, after the original has been lost, and section 3334, Code of 1904, has no application. *Baber v. Baber*, 740.

BILL IN EQUITY. See **EQUITY**.

BILL OF CONFORMITY. See **TRUSTS AND TRUSTEES**.

BILL OF EXCEPTIONS. See **EXCEPTIONS, BILL OF**.

BILL OF PARTICULARS.

Civil and Criminal Cases.—The right to call for, and the duty to furnish, a bill of particulars in civil cases is of frequent application, and is regulated by section 3249 of the Code. The statute confers the right "in any action or motion," and declares how it may be enforced. Apparently, this statute was not intended to apply to a criminal prosecution, but the right is inherent in the trial court in the orderly administration of justice, to prevent wrong and injustice to persons who are presumed to be innocent, and to assure to them their constitutional rights. The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by a bill of particulars; but if the offense is not charged in the indictment, the defect cannot be supplied by a bill of particulars. *Pine v. Commonwealth*, 812.

BILL OF REVIEW.

Rehearing.—An erroneous petition for rehearing, where the court by entering a final decree in vacation had lost control of the cause, may be treated as a bill of review, where it plainly sought to correct an error of law apparent upon the face of the record, and was, in substance, a bill of review, which is the appropriate proceeding for the correction of a final decree by the court in which it has been rendered. *Matney v. Yates*, 506.

BILLS, NOTES AND CHECKS.

Attorney's Fees.—A provision on the face of a negotiable note for an attorney's fee for making collection is valid, subject always to the power of the court, if the fee be reasonable in amount or unconscionable, to reduce it. *Triplett v. Second National Bank*, 189.

BILLS, NOTES AND CHECKS—Continued.

Cancellation.—A motion for judgment under section 3211 of the Code of 1904 was made by plaintiff against the administrators of a decedent, upon a promissory note alleged to have been made by the decedent payable to the plaintiff. To sustain the motion a mutilated paper in the handwriting of the decedent was presented, upon which there was neither date nor signature, both apparently having been destroyed by burning. Only one witness, a brother of plaintiff, was introduced by plaintiff to prove the existence of the note described in the notice. He was an ignorant man and his testimony was vague and unsatisfactory. No attempt was made to explain or account for the mutilation of the paper. Held: That the evidence was insufficient to sustain a judgment for plaintiff. *Jones' Adm'rs v. Coleman*, 86.

Under Code of 1904, section 2841-a, paragraph 123, where the date and signature on a promissory negotiable note had both apparently been destroyed by burning, the presumption is that the burning was intentional and done for the purpose of cancelling the instrument. This presumption can only be overcome by evidence showing that such burning was done "Unintentionally, or under a mistake, or without authority." *Jones' Adm'rs v. Coleman*, 86.

Mutilation.— See *infra*, "Cancellation."

Release of Endorser.—A surety is entitled to be relieved from his liability to pay the debt of his principal, either in whole or in part as the case may be, if the creditor, without the consent of the surety, releases any lien which he may have on any property of the principal as security for the debt, and it is the duty of a creditor holding collateral securities to preserve them and be ready to surrender them to the debtor when he demands payment of the debt. But in the instant case the evidence utterly failed to show that the creditor ever had possession or control of any collateral security for the debt involved or released any lien thereon. *Triplett v. Second National Bank*, 189.

BONA FIDE PURCHASER. See RECORDING ACTS; VENDOR AND PURCHASER.

BONDS.

Title Bond.— See VENDOR AND PURCHASER.

BOOK ENTRIES. See DOCUMENTARY EVIDENCE.

BOUNDARIES.

Landmarks and Acreage.—Definitely established landmarks fixed by the parties, or by the conveyance, will always prevail over acreage. *Gravatt v. Lane*, 44.

Non-Navigable Streams.—Riparian owners (on non-navigable streams) are presumed to own to the middle thread of the stream; and when they do own to the middle and convey by a deed calling for the stream as a boundary, they are conclusively presumed in law to convey to the middle, unless they expressly exclude that presumption by words in the conveyance. The presumption of ownership to the middle of the stream, however, is a rebuttable presumption, and yields to proof that the edge of the stream is the true boundary line. When this latter fact affirmatively appears, there can be no presumption that a deed calling for the stream was intended as a conveyance to the middle. A grantor is not presumed to intend to convey more than he owns. *Jennings v. Marston*, 79.

Parol Evidence.—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury, or by the court, by the aid of extrinsic evidence. *Asberry v. Mitchell*, 276.

Partition.—In an action of ejectment, where it appears that the purpose of the parties to a deed was to make an equitable partition of a larger tract of land, a verdict of the jury sustaining a line established by definite landmarks set out in the deed will not be disturbed, where the line thus ascertained by the jury to be the true line makes a fair partition of the property and vests in the grantee of the deed at least 200 acres of the land, whereas the deed estimated his proportion of the land to be only 150 acres. And this notwithstanding the contention of the grantee that the deed to him only reserved 43 acres of the larger tract, and that the line between the two tracts should be surveyed so as to carry out this purpose. The tract was believed to contain about 196 acres, but in fact contained 258 acres. *Gravatt v. Lane*, 44.

Reference to Prior Deed.—Where a written contract for the sale of land described the subject matter of the sale as the tract which was conveyed to the vendor by his father by a certain deed, the vendee is charged with knowledge of the boundaries of the tract, as described in that deed. *Riner v. Lester*, 563.

BOUNDARIES—Continued.

Sufficiency of Description of Land.—In a contract for the conveyance of land, the specific performance of which was sought by complainant, the land was described as 100 acres of land bounded by R. on the north and by M. on the south, off of the west end of the farm of the vendor. The location of the R. and M. tracts, and the western boundary of the vendor's land were well known to all the parties. As the language of the contract, giving the north and south boundary, and providing that the 100 acres be cut off of the west end of the farm of the vendor, necessarily imports that the east line must run due north and south, the land is sufficiently described in the contract to enable the court, with the aid of permissible extrinsic evidence, to locate it. *Asberry v. Mitchell*, 276.

Waters and Watercourses.— See *infra*, "Non-Navigable Streams."

BRIDGES. See **CROSSINGS.**

BROKERS.

Contract for Sale of Real Estate—Share in Profits.— See *infra*, "Real Estate Brokers."

Real Estate Brokers.— *Appellant effected a sale of timber on land which he owned in common with others, and at the same time released to the purchasers a claim for an undivided interest in the land. It appeared from the evidence that the vendee would not have purchased the timber without the inclusion of appellant's claim of title in the sale of it. The title claimed by appellant was not proved to be a valid claim, but it constituted a cloud upon the title and its extinguishment was of value to the vendee of the timber. Held: That the burden of proof was upon the appellant to show by a preponderance of evidence that the cloud upon the title to the timber had some definite value, and the appellant having sustained the burden of proof which rested upon him by proving in a satisfactory way a definite selling value of such cloud upon the title at the time of the sale of the timber, was entitled to a part of the purchase price as compensation for the release of his claim. Harman v. Moss, 399.*

Commission.—A broker or agent guilty of bad faith to his principal forfeits all commissions or compensation for his services. But in the case at bar where the appellant, under agreement with his cotenants, under which he made the sale

BROKERS—Continued.**Real Estate Brokers—Continued.****Commission—Continued.**

of timber in question, believed he occupied the relation of an optionee purchaser and not that of broker for his co-tenants, he is not guilty of fraud which will bar him from recovering compensation for the sale, in representing to his co-tenants that the timber sold for a less sum than that actually received by him, when he believed that his personal services, money expended, a right of way over his own land, and other considerations, were worth all the purchase price over and above the price named by him to his co-tenants. *Harman v. Moss*, 399.

Where the bill expressly stated that appellant was entitled to a reasonable commission or compensation for his services in a sale of timber, the issue that appellant should be denied all compensation for his services, not having been made in the pleadings or in the court below, cannot be made by assignment of error on appeal. *Harman v. Moss*, 399.

Appellant effected a sale of the timber upon a tract of land, of which he was part owner, in common with appellees and others, under a certain agreement or option by which was granted to the appellant the right of buying or selling the timber on the land at \$10.00 per acre. Appellant did not undertake the sale as an ordinary real estate agent or broker. The sale was of a special character and appellant's situation and qualifications for making the sale were exceptional, and the benefits flowing to appellees as the result of a very advantageous sale were peculiar. Therefore, appellant's compensation for making the sale of the timber should not be measured or governed by the customary commission of five per cent., but should be fixed by the measure of *quantum meruit*, and ten per cent. is not an unreasonable compensation for his services. *Harman v. Moss*, 399.

In effecting a sale of timber on land which he held in common with appellees and others, appellant also granted to the purchaser of the timber, as part of the consideration for the purchase price, a right of way over a tract of which he was sole owner. Held: That the proper measure of compensation for the right of way was the price therefor at which the appellant, under the circumstances, could reasonably have expected to sell it, in connection with the sale of his interest and the other interests which he was authorized to sell in the timber, and in connection also with the sale of the timber on his own tract, and not its salable or condemnation value, independent of its acquisition by the vendee in connection with the purchase of the timber. Nor would a valua-

BROKERS—Continued.**Real Estate Brokers—Continued.**

tion of the right of way on the basis of the price at which the timber in which appellees were interested would have sold, independently and separately from the sale of the timber on appellant's own tract and the right of way across it, be a correct measure of its value. *Harman v. Moss*, 399.

Share in Profits.—Complainant purchased a large tract of mountain land at a judicial sale, and subsequently sold it to one G. for a price which netted him a substantial profit. Defendant held a lien upon this land and it was under a decree in a suit brought to enforce this lien that complainant bought the land upon the instigation of defendant, and complainant entered into a contract with defendant whereby he agreed to give to defendant a one-third interest in the profits upon a sale, made by the complainant, with the assistance of the defendant, of said lands, after all the costs and expenses had been paid, in consideration that the defendant should use his best efforts to make a sale of the property, show the property to prospective buyers, use his best efforts to keep fire off the property, and keep parties from robbing the same, and exercise in fact, a general supervision of the property, under the direction of the complainant. The course of dealings between complainant and defendant, as evidenced by their correspondence and otherwise, indicated that defendant was regarded, not merely as an agent, but an interested party. He continued to look after the physical protection of the property, was active and diligent in his efforts to make a sale, and responded promptly and helpfully when he was called upon in the preliminary negotiations which resulted finally in the sale to G. Held: That there was no error in the decree which awarded defendant one-third of the net profits arising from the sale to G., notwithstanding that the sale to G. was not made by defendant. *Alexander v. Critcher*, 723.

Under the circumstances set out in the preceding head-note the fact that defendant notified the purchaser, G., that he was entitled to one-third of the money to be paid by him for the land, and warning him not to pay over this amount without defendant's consent, was not such an interference with the sale as would bar his right to one-third of the purchase money, defendant having reason to suppose that complainant would not keep the contract on his part; his duty did not require him to stand silently by and submit to a repudiation of the contract by complainant. *Alexander v. Critcher*, 723.

BUILDING CONTRACTS.

Assignment by General Contractor.—See **ASSIGNMENTS.**

BURDEN OF PROOF. See **PRESUMPTIONS AND BURDEN OF PROOF.**

BURIAL. See **DEAD BODIES.**

CANCELLATION. See **BILLS, NOTES AND CHECKS.**

CARRIERS.

Baggage.—Custom and usage may have an important bearing on whether stipulations on a ticket may, in particular cases, constitute a contract, as well as at the same time serve in part the primary function of a ticket. *Louisville & Nashville R. Co. v. Rieley*, 469.

The liability of a carrier of baggage is, at common law, that of an insurer, and the carrier's liability with respect to the baggage of the passenger can only be limited by express contract between the passenger and carrier. It cannot be done by notice of any *ex parte* regulation of the carrier, however reasonable. And an *ex parte* stipulation on a ticket limiting the common-law liability of a carrier with respect to the baggage of the passenger, is no evidence of a contract in the absence of all evidence of any knowledge or assent to it by the passenger, at the time the ticket was purchased. *Louisville & Nashville R. Co. v. Rieley*, 469.

Carriers of Passengers.—See *infra*, "Baggage;" "Tickets and Fares;" and see **STREET RAILROADS.**

Boarding or Alighting from Moving Car.—See **STREET RAILROADS.**

Contributory Negligence.—See **STREET RAILROADS.**

Relationship of Passenger and Carrier.—See **STREET RAILROADS.**

Fares.—See *infra*, "Tickets and Fares."

Limitation of Liability.—The liability of a carrier of baggage is, at common law, that of an insurer, and the carrier's liability with respect to the baggage of the passenger can only be limited by express contract between the passenger and carrier. It cannot be done by notice or any *ex parte* regulation of the carrier, however reasonable. And an *ex parte* stipulation on a ticket limiting the common-law liability of a carrier with respect to the baggage of the passenger, is no evidence of a contract in the absence of all evidence of any knowledge or assent to it by the passenger, at the time the

CARRIERS—Continued.**Limitation of Liability—Continued.**

ticket was purchased. *Louisville & Nashville R. Co. v. Rieley*, 469.

Tickets and Fares.—Ticket as Contract.—A railroad ticket being delivered to the passenger to be used for its primary function to serve as evidence, as between the conductor and the passenger, and being accepted and so used by him, may also afford evidence of the contract of carriage between the passenger and carrier to the extent that such contract is expressed by the ticket, if the passenger knowingly assents to the matters so expressed. *Louisville & Nashville R. Co. v. Rieley*, 469.

Where there exists evidence of actual knowledge on the part of the passenger of the stipulations on the ticket, and acquiescence therein, there can be no question that the ticket evidences a contract as well as serves its primary function as evidence as between the conductor and the passenger. *Louisville & Nashville R. Co. v. Rieley*, 469.

Time Limit.—In general, it may be said that a time limit on a railroad ticket may be, at the same time, both a contract of carriage between a passenger and carrier, and a regulation of the carrier for the conduct of its business. *Louisville & Nashville R. Co. v. Rieley*, 469.

Primarily, the function of a ticket is to serve as evidence as between the conductor of the carrier's train and the passenger of the latter's right to transportation. When a ticket is serving such function, the time limit contained on it (whether on its face, or back, or within its folds, is immaterial) is a regulation of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its validity as a contract between a passenger and carrier. *Louisville & Nashville R. Co. v. Rieley*, 469.

Where, as in the instant case, a train of the carrier runs daily, from the place of departure to the place of destination of the passenger, and there is no statutory regulation on the subject, or regulation of somebody having authority in the premises, such as the State Corporation Commission, to the contrary, a time limit in the following language: "Good continuous passage beginning date of sale only on train scheduled to stop at destination, otherwise passenger transfer to local train," printed on the face of a regular first-class ticket, is a reasonable regulation and valid. *Louisville & Nashville R. Co. v. Rieley*, 469.

CARRIERS—Continued.**Tickets and Fares—Continued.**

Usages and Customs.—Custom and usage may have an important bearing on whether stipulations on a ticket may, in particular cases, constitute a contract, as well as at the same time serve in part the primary function of a ticket. *Louisville & Nashville R. Co. v. Rieley*, 469.

Time Limit.—See *infra*, "Tickets and Fares."

Usages and Customs.—See *infra*, "Tickets and Fares."

CAUSA MORTIS. See GIFTS.**CERTIORARI.**

Adequate Remedy at Law.—A property owner claimed that, without his fault, he had been deprived of the appeal given him by a statute by the action of a street committee in overruling, without his knowledge, his objections to the ascertainment of damages to his premises by grading the street in front thereof. Defendants demurred on the ground that complainant had a full, adequate and complete remedy at law by a writ of *certiorari*. As counsel for defendant admitted that the proceedings of the committee and council were regular on their face, and as *certiorari* brings up the record for inspection only, or in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein, the writ would have been of no value to complainant. In such case equity has jurisdiction, and the demurrer was properly overruled. *Appalachia v. Mainous*, 666.

Distinguished from Other Writs.—*Certiorari* is a common-law writ, issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. At common law when not ancillary to other process, *certiorari* is in the nature of a writ of error. It has the same functions to inferior tribunals whose proceedings are not according to the course of the common law as the writ of error has to common-law courts. There is this difference, however, *certiorari* brings up the record for inspection only, while on error the proceedings below are superseded. It differs from appeal in that it brings up the case on the record, while on appeal the case is brought up on the merits; and from *mandamus*, for by that writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it. *Appalachia v. Mainous*, 666.

CERTIORARI—Continued.

Use in Virginia.—In Virginia there is no statute enlarging the scope of the writ of *certiorari*. Its use must be measured by the common law, and except to transfer a record from an inferior to a superior court, is so rare as to be almost obsolete. *Appalachia v. Mainous*, 666.

CHAMBERS AND VACATION.

Judgments and Decrees.—Final decrees in vacation ought to guard against cutting off the opportunity for amendment. *Matney v. Yates*, 506.

Section 3293 of the Code of 1904, giving the court "control over all proceedings in the office during the preceding vacation," has no application to vacation decrees entered pursuant to provisions of section 3427 of the Code of 1904, providing for the submission of motions, actions at law and chancery causes for decision in vacation. *Matney v. Yates*, 506.

CHANCERY. See **EQUITY.**

CHANGE OF DOMICIL. See **TAXATION.**

CHANGING GRADE. See **STREETS AND HIGHWAYS.**

CHARACTER. See **WITNESSES.**

CLERKS OF COURT.

Compensation.—See *infra*, "Extra Compensation for Current General Index;" "Fee for Recording Deed to County."

A board of supervisors undoubtedly has a discretion as to fixing the time or times of payment of salaries and allowances of county officers, if exercised for good and sufficient cause—such as the condition of the county treasury in the lack of funds to pay same at a certain time or times in the year, because of some situation against which the board did not and could not reasonably have been expected to provide in the next preceding laying of the county levy, or the like cause, operating impersonally. The board of supervisors of a county has no discretion to fix a different time of payment of the annual salary and other allowances provided for by law of a county clerk from the times of payment of salaries and allowances of other county officers allowed by law, on the ground that the clerk is not discharging or has not discharged his duty as such. *Board of Supervisors v. Coons*, 783.

CLERKS OF COURT—Continued.

Compensation—Continued.

An obligation of a county of the State to a clerk for the unpaid amount of allowances made him by order of the board of supervisors, bears no interest. *Board of Supervisors v. Coons*, 783.

The board of supervisors of a county has no discretion to refuse to act in fixing the compensation and other allowances of a county clerk allowed by law *at something*, within the limits prescribed by statute; nor, if it acts, to impose a condition or conditions upon the payment of such compensation, on the ground that the clerk has not performed, or is not performing his duties as such. *Board of Supervisors v. Coons*, 783.

Deeds.—A county clerk is entitled to the fee allowed by section 3505, Code of 1904, for recording a deed to the county, notwithstanding a general allowance to the clerk for road services. *Board of Supervisors v. Coons*, 783.

Extra Compensation for Current General Index.—The extra allowance allowed in section 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, p. 772, to a clerk of court or other suitable person for preparing a general index to the deed books, will books, etc., in the clerk's office, applies only to some person, not necessarily the clerk, specially appointed by the court to make the general index mentioned in the statute, and does not apply to the current general indexing subsequent to the order of the court making such appointment. In the instant case it was the duty of the clerk to do the current general indexing and he was not entitled to any extra compensation therefor other than his salary as county clerk. An order of court allowing such extra compensation would be without authority of law, and the board of supervisors would have no authority thereunder to "direct warrant therefor" or otherwise authorize such payment out of the county treasury. *Board of Supervisors v. Coons*, 783.

Fee for Recording Deed to County.—A county clerk is entitled to the fee allowed by section 3505, Code of 1904, for recording a deed to the county, notwithstanding a general allowance to the clerk for road services. *Board of Supervisors v. Coons*, 783.

General Index System.—See *infra*, "Indexing."

Indexing.—Action of the circuit court adopting a general index system was, under the statute formerly existing on the subject, and is now under the statute at present existing on the

CLERKS OF COURT—Continued.

Indexing—Continued.

subject, a condition precedent to the ascertainment of what general index system, if any, other than that previously in use, it is the duty of a county clerk to use at any given time in current general indexing the records of his office. *Board of Supervisors v. Coons*, 783.

An order was entered under section 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, page 772, by which the clerk was appointed to make the general index to the deed books, will books, etc., in the clerk's office. Prior to such order there was in use in the county a general index system which was not ledgerized. Acting under the order, the clerk began the general indexing and adopted a ledgerized system known as the "Coons' Index System." The clerk also subsequent to the order indexed all deeds, wills, etc., according to the "Coons' Index System" and continued this current indexing until the county failed to provide him with the "Coons' Index System" and the necessary index books for the work of current general indexing, when he returned to the old general index system, subject to some improvements. Held: That the clerk was, under the circumstances, justified in returning to the old system of general indexing, and that in doing such indexing in accordance therewith he complied with his duty as prescribed by statute; and that it would not be his duty to general index the accumulated records in some general index system which might thereafter be provided and installed in the clerk's office. *Board of Supervisors v. Coons*, 783.

The extra allowance allowed in section 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, p. 772, to a clerk of court or other suitable person for preparing a general index to the deed books, will books, etc., in the clerk's office, applies only to some person, not necessarily the clerk, specially appointed by the court to make the general index mentioned in the statute, and does not apply to the current general indexing subsequent to the order of the court making such appointment. In the instant case it was the duty of the clerk to do the current general indexing and he was not entitled to any extra compensation therefor other than his salary as county clerk. An order of court allowing such extra compensation would be without authority of law, and the board of supervisors would have no authority thereunder to "direct warrant therefor" or otherwise authorize such payment out of the county treasury. *Board of Supervisors v. Coons*, 783.

CLERKS OF COURT—Continued.

Interest on back salary and allowances. Board of Supervisors *v.* Coons, 783.

CLOUD ON TITLE.

Judicial Sales.—There is no subject about which the courts are more careful than that of judicial sales. It is the effort of the courts at all times to see that the land is brought to the hammer under the most advantageous circumstances so as to realize the best price that can be obtained therefor, and to protect the interests of all parties, and it has been held that before a sale of land is decreed any cloud on the title or any impediment to a fair sale ought to be removed as far as it is practicable to do so. *Steinman v. Clinchfield Coal Corp.*, 611.

CODICILS. See **WILLS**.

COLOR OF TITLE. See **ADVERSE POSSESSION**.

COMMISSION. See **CORPORATIONS**.

COMMISSIONER IN CHANCERY. See **MASTER IN CHANCERY**.

COMMISSIONER'S REPORT. See **MASTER IN CHANCERY**.

COMPLETE RELIEF. See **JURISDICTION**.

CONCLUSIONS OF LAW. See **LEGAL CONCLUSIONS**.

CONDONATION. See **DIVORCE**.

CONFESSIONS.

Voluntary.—*Adultery.*—A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. *Lewis v. Lewis*, 99.

CONFIDENTIAL COMMUNICATIONS. See **WITNESSES**.

CONFLICT OF LAWS.

Change of Domicil.— See **TAXATION**.

Domicil.— See **TAXATION**.

Residence.— See **TAXATION**.

CONSENT. See CONTINUANCE.

CONSEQUENTIAL DAMAGES. See DAMAGES.

CONSIDERATION. See TRUSTS AND TRUSTEES.

Release.—See RELEASE.

CONSTITUTIONAL LAW.

Classification of Constitutional Provision.—See *infra*, “Mandatory, Prohibitive and Permissive or Declaratory.”

Construction.—See *infra*, “Expressio Unius Est Exclusio Alterius.”

Constitution not a Grant of Power, but a Restriction upon the Power of the Legislature.—In determining whether an act of the legislature is forbidden by the State Constitution, it must be borne in mind that the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it has been taken away; that the legislature is practically omnipotent in the matter of legislation, except in so far as it is restrained by the Constitution, expressly or by plain, or (as some of the cases express it) by necessary, implication. *Pine v. Commonwealth*, 812.

Expediency.—The Supreme Court of Appeals is of opinion that the purpose of the act is a wise one, but even if it were of a different opinion, it could make no difference in the result so long as it is within the legislative power, for judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed. *Pine v. Commonwealth*, 812.

Presumption as to the Meaning of Words and Phrases.—The presumption is that the same meaning attaches to a given word or phrase which is repeated in a Constitution, unless the contrary is made to appear, and hence the whole instrument should be examined to ascertain what that meaning is. *Pine v. Commonwealth*, 812.

Presumption in Favor of Act.—The mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a co-ordinate department of the government; every act is presumed to be constitutional until the contrary is made plainly to appear, and all doubts on the subject are to be solved in favor of its validity. *Pine v. Commonwealth*, 812.

CONSTITUTIONAL LAW—Continued.

Construction—Continued.

Statute Adopted from Another State.—While the interpretation by the highest court of a State from which a statute is taken will be followed, the legislature cannot, by enacting a statute which has been held constitutional and valid by the highest court of another State, deprive the courts of this State of the right to determine for themselves the constitutionality of such statute. *Pine v. Commonwealth*, 812.

Corporations.—See CORPORATIONS.

Declaratory Provisions.—See *infra*, "Mandatory, Prohibitive and Permissive or Declaratory."

Evidence.—*Power of Legislature as to Rules of Evidence.*—Section 55 of the prohibition act, Acts 1916, page 215, declaring that the possession of certain quantities of liquor shall be *prima facie* evidence of a purpose of sale, merely establishes a rule of evidence; and that such rules may be established by the legislature is well settled. *Pine v. Commonwealth*, 812.

Expressio Unius Est Exclusio Alterius.—The maxim, *expressio unius est exclusio alterius*, though often of importance and value, is not of universal application, even in the interpretation of State Constitutions. They are the fundamental, permanent law of the land, providing for the future as well as the present, and should carry out the principles of government as gathered from the instrument when read as a whole. The application of arbitrary rules of construction will be resorted to with hesitation, especially when it would bring about results contrary to the declared public policy of the State, and hamper the legislature in amply providing for the health, morals, safety and welfare of the people. Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the State, will be considered as prohibiting the powers of the legislature. The principle of the maxim should be applied with great caution to those provisions of the Constitution which relate to the legislative department, and the exclusion should not be made unless it appears to be a plainly necessary result of the language used. *Pine v. Commonwealth*, 812.

Indictment and Information.—*Validity of law.*—Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, plea, motion or

CONSTITUTIONAL LAW—Continued.

Indictment and Information—Continued.

otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time. *Pine v. Commonwealth*, 812.

Cause and Nature of Accusation.—While the Constitution guarantees to every man the right to demand "the cause and nature of his accusation," it does not prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment or information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand "the cause and nature of his accusation." If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and which he will be held to have waived unless he asserts it. *Pine v. Commonwealth*, 812.

Interpretation and Construction.— See *infra*, "Construction."

Intoxicating Liquors.—By section 62, of the Constitution of 1902, it is provided that: "The General Assembly shall have full power to enact local option or dispensary laws, or any other laws, controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors." This section does not authorize the enactment of a single law the legislature might not have enacted if the section had not been adopted. It is simply declaratory of the existing law, but thereby inviting attention to the subject. Complete authority over the whole subject of intoxicating liquors has not been taken away from the legislature by an express provision, nor by necessary implication, and the maxim *expressio unius est exclusio alterius* does not apply. *Pine v. Commonwealth*, 812.

Mapp Act.—The provisions of the act of Assembly approved March 10, 1916 (Acts 1916, page 215), commonly known as the prohibition act, so far as called in question in this case, are not forbidden by section 62 of the Constitution of this State. *Pine v. Commonwealth*, 812.

Power of Legislature as to Regulations in Regard to Intoxicating Liquors.—In this State, from the earliest date to the adoption of the present Constitution, the legislature has exercised uncontrolled power over the manufacture and sale of intoxicating liquors, and since local option and dispensary laws have come into vogue, has exercised undisputed author-

CONSTITUTIONAL LAW—Continued.

Intoxicating Liquors—Continued.

ity and control over these subjects also, and it would require very plain language in a constitutional provision to indicate that it was the purpose of the constitutional convention to take away from the legislature a power exercised by the legislatures of the other States of the Union, and one that has been within the province of the legislature of this State from the earliest date. *Pine v. Commonwealth*, 812.

The Supreme Court of Appeals is of opinion that the purpose of the act is a wise one, but even if it were of a different opinion, it could make no difference in the result so long as it is within the legislative power, for judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed. *Pine v. Commonwealth*, 812.

Mandatory, Prohibitive and Permissive or Declaratory.—The constitutional provisions relating to the legislative department have been classified as mandatory and prohibitive. The oaths of the legislators bind them to the performance of the one, and the courts restrain them from the performance of the other, if they should overstep the limits set. As to all other powers they are free to act as their judgments dictate. In the main this classification is correct, but Constitutions sometimes contain other provisions relating to or affecting the legislative department, which may be classified as either permissive or declaratory. *Pine v. Commonwealth*, 812.

When the Constitution has fully dealt with a subject and covered the entire ground, the legislature would be powerless to make any change in it, unless specially authorized to do so, and it may be desirable to confer such authority. In such case the authority is conferred by a permissive grant in the Constitution. In other cases the constitutional provision is only declaratory of the existing law, and there may or may not be annexed to it a prohibitory provision. *Pine v. Commonwealth*, 812.

Permissive Provisions.—See *infra*, "Mandatory, Prohibitive and Permissive or Declaratory."

Presumptions and Burden of Proof.—The mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a co-ordinate department of the government; every act is presumed to be constitutional until the contrary is made plainly to appear,

CONSTITUTIONAL LAW—Continued.

Presumptions and Burden of Proof—Continued.

and all doubts on the subject are to be solved in favor of its validity. *Pine v. Commonwealth*, 812.

Presumption as to the meaning of words and phrases. *Pine v. Commonwealth*, 812.

Prohibitive Provisions.—See *infra*, "Mandatory, Prohibitive and Permissive or Declaratory."

Statutes.—Constitutional provision that no law shall embrace more than one object, which shall be expressed in its title. See STATUTES.

Taxation.—See TAXATION.

Title of Statutes.—See STATUTES.

CONSTRUCTION. See CONSTITUTIONAL LAW; CONTRACTS; INTERPRETATION AND CONSTRUCTION; LANDLORD AND TENANT; VENDOR AND PURCHASER; WILLS.

CONSTRUCTIVE TRUSTS. See TRUSTS AND TRUSTEES.

CONTINUANCES.

Absent Witness.—See *infra*, "Discretion of Trial Court."

Affidavit of Defense.—Waiver of by consenting to or accepting continuance. *Gehl v. Baker*, 23.

Appeal and Error.—A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion unless plainly erroneous. *Matoaka Coal v. Clinch Valley Min.*, 522.

Consent.—Circumstances from which the trial judge and defendant's counsel were warranted in regarding a continuance as made with the consent of the plaintiff, or at least without objection on his part. *Gehl v. Baker*, 23.

Discretion of Trial Court.—See *infra*, "Appeal and Error."

A motion for a continuance by the defendant was based upon the absence of a witness largely interested in the defendant company, who had not been summoned as a witness.

CONTINUANCES—Continued.**Discretion of Trial Court—Continued.**

The case was called earlier in the term than counsel for defendant anticipated, but they had no reason to suppose that a trial would not be had during the term, and no steps had been taken to have the witness in readiness to attend. When the case was first called the witness was out of reach, and, so far as the record disclosed, the testimony of the witness would have been largely if not wholly cumulative and quite unlikely to have affected the result. Held: That the trial court did not abuse its discretion in refusing the continuance. *Matoaka Coal v. Clinch Valley Min.*, 522.

CONTRACTS.

Assignments.—See ASSIGNMENTS.

Construction.—See USAGES AND CUSTOMS and see *infra*, "Questions of Law and Fact."

Parol Evidence.—The antecedent conversations and agreements between the parties, so far as they are in conflict with a written contract, cannot, of course, be received to vary or contradict it, but if its meaning be doubtful the surrounding circumstances, the condition and avowed purposes of the parties, as well as the subject matter of the contract, may be proved by parol testimony in order to enable the court to determine its meaning. *McCorkle & Son v. Kincaid*, 546.

Surrounding Circumstances.—In order to arrive at a correct construction of a contract, it is proper to consider the situation of the parties and the circumstances and negotiations which led to its execution. *Alexander v. Critcher*, 723.

It is entirely proper to permit the jury to consider the situation of the parties and the circumstances leading up to the making of the contract for the purpose of determining whether a usage of trade operated upon the minds of the parties in using the language which was employed in the contract. *Walker v. Gateway Milling Co.*, 217.

Contract of Carriage.—See STREET RAILROADS.

Damages.—See DAMAGES.

Gifts.—See GIFTS.

Implied Contracts.—See IMPLIED CONTRACTS.

CONTRACTS—Continued.

Interference with Contract Relation.—See MASTER AND SERVANT.

Master and Servant.—See MASTER AND SERVANT.

Mechanics' Liens.—See MECHANICS' LIENS.

Options.—See OPTIONS.

Parol Evidence.—The antecedent conversations and agreements between the parties, so far as they are in conflict with a written contract, cannot, of course, be received to vary or contradict it, but if its meaning be doubtful the surrounding circumstances, the condition and avowed purposes of the parties, as well as the subject matter of the contract, may be proved by parol testimony in order to enable the court to determine its meaning. *McCorkle & Son v. Kincaid*, 546.

Questions of Law and Fact.—Although it is error for an instruction to submit to the jury the construction of a contract when it was the duty of the court to construe it, yet where the error is favorable to the plaintiffs in error and not injurious to them, it is harmless as to them. *McCorkle & Son v. Kincaid*, 546.

Where the true meaning of the terms of a contract depended upon controverted facts and conflicting evidence, the question was one for the jury, upon proper instructions, to determine. *Walker v. Gateway Milling Co.*, 217.

Release.—See RELEASE.

Sales.—See SALES; VENDOR AND PURCHASER.

Seals and Sealed Instruments.—See SEALS AND SEALED INSTRUMENTS.

Specific Performance.—See SPECIFIC PERFORMANCE.

Surrounding Circumstances.—See *infra*, "Construction."struction."

Ticket as Contract.—A railroad ticket being delivered to the passenger to be used for its primary function to serve as evidence, as between the conductor and the passenger, and being accepted and so used by him, may also afford evidence of the contract of carriage between the passenger and carrier to the extent that such contract is expressed by the ticket, if the passenger knowingly assents to the matters so expressed. *Louisville & Nashville R. Co. v. Rieley*, 469.

CONTRACTS—Continued.**Ticket as Contract—Continued.**

Where there exists evidence of actual knowledge on the part of the passenger of the stipulations on the ticket, and acquiescence therein, there can be no question that the ticket evidences a contract as well as serves its primary function as evidence as between the conductor and the passenger. *Louisville & Nashville R. Co. v. Rieley*, 469.

Time as Essence of a Contract of Sale.—*Sachs v. Owings*, 162.

Usages and Customs.—See **SALES; USAGES AND CUSTOMS.**

A usage or custom of either a trade or a locality, which would otherwise form a part of a transaction will equally form a part when the transaction has been embodied in a writing unless the terms of the writing clearly exclude the usage or custom; and the application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service. *Walker v. Gateway Milling Co.*, 217.

CONTRIBUTORY NEGLIGENCE. See **NEGLIGENCE.**

CONVEYANCES. See **DEEDS; FRAUDULENT AND VOLUNTARY CONVEYANCES.**

CO-PARCENERS. See **PARCENARY, ESTATES IN.**

CORONERS.

Burial of Dead Bodies.—See **DEAD BODIES.**

CORPORATION COMMISSION. See **CORPORATIONS.**

CORPORATIONS.

Commission.—See *infra*, "Voluntary Dissolution of Public Service Corporations."

Constitutional Law.—See *infra*, "Voluntary Dissolution of Public Service Corporations."

Corporation Commission.—See *infra*, "Voluntary Dissolution of Public Service Corporations."

Dissolution.—See *infra*, "Voluntary Dissolution of Public Service Corporations."

CORPORATIONS—Continued.

Interest of the Public.—See *infra*, “Voluntary Dissolution of Public Service Corporations.”

Officers and Agents of Corporations.—See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Receivers.—Upon the filing of a certificate of unanimous consent of stockholders to the dissolution of a corporation, as provided by section 1105-e, subsection 30, Code of 1904, with the State Corporation Commission, the sole question before that body was whether the company had complied with the law entitling it to a certificate of dissolution. If it had, it was the duty of the commission to issue the certificate, and no court (except on appeal) could enter any order that would “interfere with the commission in the performance of its official duties.” And the appointment of a receiver for the corporation between the filing of the certificate of consent and its final amendment as to signature and execution, is no reason for refusing a certificate of dissolution, if otherwise it should have been granted. *Jeffries v. Com.*, 425.

State Corporation Commission.—See *infra*, “Voluntary Dissolution of Public Service Corporations.”

Stock and Stockholders.—See STOCK AND STOCKHOLDERS.

Suspension of Corporate Functions.—Public service corporations, so far as the general public is concerned, may always suspend their corporate functions in part or in whole, temporarily or finally, with the consent of the State. *Jeffries v. Com.*, 425.

Voluntary Dissolution of Public Service Corporations.—*Application for Receiver.*—Upon the filing of a certificate of unanimous consent of stockholders to the dissolution of a corporation, as provided by section 1105-e, subsection 30, Code of 1904, with the State Corporation Commission, the sole question before that body was whether the company had complied with the law entitling it to a certificate of dissolution. If it had, it was the duty of the commission to issue the certificate, and no court (except on appeal) could enter any order that would “interfere with the commission in the performance of its official duties.” And the appointment of a receiver for the corporation between the filing of the certificate of consent and its final amendment as to signature

CORPORATIONS—Continued.

Voluntary Dissolution of Public Service Corporations—Continued.

and execution, is no reason for refusing a certificate of dissolution, if otherwise it should have been granted. *Jeffries v. Com.*, 425.

Constitutionality of Subsection 30 of Section 1105-e, Code of 1904.—Subsection 30 of section 1105-e, Code of 1904, as amended, Acts of 1906, page 576, is not unconstitutional as violating section 52 of the Constitution, providing that no law shall embrace more than one object, which shall be expressed in its title. The act which amended subsection (30) of chapter 5 was entitled, "An act to amend and re-enact section (30) of chapter 5 of an act entitled an act concerning corporations, which became a law on the 21st of May, 1908" (Acts 1906, page 576). The title of an act amending the Code is sufficient if it refers to the chapter and sections to be amended and the body of the amendatory act is within itself germane to the subject of the chapter referred to in the title. *Jeffries v. Com.*, 425.

Constitutionality of Section 1105-e, Subsection 30.—Subsection 30 of section 1105-e, Code of 1904, providing for the voluntary dissolution of corporations is not unconstitutional when extended to public service corporations as unduly curtailing the powers of the State Corporation Commission. The commission must look to the Constitution and laws pursuant thereto for its powers, and the powers therein conferred do not extend beyond the control and regulation of corporations continuing to hold on to and exercise their corporate franchises. *Jeffries v. Com.*, 425.

Constitution of 1902, Section 154.—The Constitution of 1902, section 154, provides that: "Provision shall be made, by general laws, for the voluntary surrender of its charter by any corporation, and for the forfeiture thereof for non-user or mis-user." This section in terms embraces corporations of every class, public service corporations as well as others, and there is no satisfactory reason for resorting to rules of construction to construe this language which, in itself, is so conspicuously clear. *Jeffries v. Com.*, 425.

Interest of the Public.—Charters of incorporation are contracts between the incorporators and the State. The public has an interest in public service corporations, but it does not own them. Private property invested in a railroad enterprise becomes impressed with a public service, but still remains the property of the stockholders and cannot be confiscated. The public has never yet been held to have a vested right in the perpetual operation of a railroad or other public service corporation. *Jeffries v. Com.*, 425.

CORPORATIONS—Continued.

Voluntary Dissolution of Public Service Corporations—Continued.

Power of Legislature.—Code of 1904, section 1105-e, chapter 5, subsection 1, of the act concerning corporations, which provides that, "the provisions of this chapter, except in those cases where, by the express terms of the provisions hereof, it is confined to corporations created under this act, shall be construed to apply to all corporations of this State organized or to be organized for any lawful purpose for which a corporation may be created under this act," is not to be construed as declaring merely that corporations created outside of the act were to be affected just as much as those that were created under the act, and as referring to private corporations only in each instance; that the subsection plainly intends to embrace *all* corporations, affirmatively appears from the language of subsection (2) (a) and (2) (h), wherein the terms "charter," "certificate of incorporation" and "articles of association" are used. The legislature evidently meant to designate by the term "charter" corporations already existing, and by the terms "certificate of incorporation" and "articles of association" corporations created under the act. *Jeffries v. Com.*, 425.

The form and wisdom of the method of voluntary surrender of corporate franchises are matters which were expressly delegated to the legislature by the terms of the Constitution, and as to them neither the Corporation Commission nor the Supreme Court of Appeals can have any controlling voice. *Jeffries v. Com.*, 425.

Right to.—A public service corporation, created and existing under the laws of this State has, under those laws, the same right of voluntary dissolution which is accorded to all other business corporations. *Jeffries v. Com.*, 425.

Section 154 of the Constitution.—Section 154 of the Constitution of 1902, provides for the creation, extension and amendment of charters of every kind, under general laws to be enacted by the General Assembly; the preservation of the right of repeal by the State; and the delegation to the General Assembly of the power and duty of providing, as it might see proper, but by general laws, for the voluntary surrender of the charter of any corporation, regardless of its class—a reservation to the State of the power of repeal, and a consent by the State to a voluntary dissolution. This section of the Constitution cannot be construed so as to exclude public service corporations from the direction in regard to voluntary dissolution, unless they are also excluded from the operation of every other part of the section. *Jeffries v. Com.*, 425.

CORPORATIONS—Continued.

Voluntary Dissolution of Public Service Corporations—Continued.

Section 1105-e, Subsection 30, Code of 1904, and Section 1294-b, Subsection 16, Code of 1904.—There is nothing in subsection 1294-b (16), Code 1904, which cannot be acted upon in perfect harmony with everything in 1105-e (30), Code 1904, in its original form; and while both sections, so far as they affected public service corporations, might not have been necessary for the common purpose of each (which was the direction of the disposition of assets), it is to be observed that neither of them provided in terms for a method whereby a corporation might surrender its charter. Therefore, there is no force in the contention that section 1105-e, section 30, Code of 1904, in its original form, could not have referred to public service corporations, because section 1294-b, section 16, Code of 1904, relating exclusively to public service corporations, was written into the statute law of the State at the same time with the original of subsection 30. *Jeffries v. Com.*, 425.

Section 1105-e, Subsection 30, Code of 1904.—At the time of the amendment to section 1105-e, subsection 30, Code of 1904, by Acts of 1906, p. 576, provision had been made by statute for the voluntary dissolution of private business corporations and for corporations having no capital stock, but no provision had been made for the voluntary dissolution of public service corporations. The amendment was so drawn as necessarily to embrace in its terms all corporations, and the only reasonable purpose which can be attributed to the action of the legislature in adopting the amendment, is a purpose to complete, by a general and uniform law applicable to all corporations, the work which had been assigned to it by the Constitution. *Jeffries v. Com.*, 425.

It was contended that subsection 30 of section 1105-e, as originally enacted, did not refer to public service corporations and that the subsection in its present amended form (Acts 1906, p. 576), contains no broader terms than the original, and therefore cannot be applied to a new class of corporations, but the history of the subsection, and the provisions of other statutes *in pari materia* with it, so far from furnishing any sound argument in support of the claim that it applies only to private corporations, are directly and convincingly to the contrary. *Jeffries v. Com.*, 425.

State Corporation Commission.—Code 1904, section 1105-e, subsection 2, i, which authorizes a corporation "to wind up and dissolve itself in the manner provided in this act," applies to public service corporations, and subsection 30 of section 1105-e. Code of 1904. prescribes the manner, leaving only a ministerial function in regard thereto with the commission. *Jeffries v. Com.*, 425.

CORPORATIONS—Continued.**Voluntary Dissolution of Public Service Corporations—Continued.***State Corporation Commission—Continued.*

Subsection 30 of section 1105-e, Code of 1904, providing for the voluntary dissolution of corporations is not unconstitutional when extended to public service corporations as unduly curtailing the powers of the State Corporation Commission. The commission must look to the Constitution and laws pursuant thereto for its powers, and the powers therein conferred do not extend beyond the control and regulation of corporations continuing to hold on to and exercise their corporate franchises, *Jeffries v. Com.*, 425.

The issuing to a public service corporation of a certificate of dissolution, as provided for in subsection 30, section 1105-e, Code of 1904, by the State Corporation Commission, is a ministerial and not a judicial function, and the argument that the function in question is too important to be a ministerial act is readily answered by the terms of the Constitution and statutes relating to the tremendously important subject of the creation of corporations, as to which the commission can only act ministerially. *Jeffries v. Com.*, 425.

The State Corporation Commission exists and derives all its powers from the Constitution and statute laws of the State; and there is no word or hint in the Constitution and statutes passed pursuant thereto which shows that the visitatorial and inquisitorial powers conferred upon that body have any relation whatever to corporations intending to dissolve and cease to do business as such. These powers plainly relate to going concerns. *Jeffries v. Com.*, 425.

Subsection 12 of Section 1294-b, Code of 1904, and Subsection 15 of Section 1294-b, Code of 1904.—Subsection 12 of section 1294-b, Code of 1904, relating to the sale under a deed of trust of the franchises and property of a corporation; subsection 15 of section 1294-b, Code of 1904, relating to such a sale under the decree of a court; and subsection 58 of section 1313-a, Code of 1904, relating to proceedings by *quo warranto* in the event of nonuser or misuser by a corporation organized for works of internal improvement, in no way deny the right of a public service corporation to voluntarily dissolve as prescribed by subsection 30, section 1105-e, Code of 1904. *Jeffries v. Com.*, 425.

Winding up.—See *infra*, "Voluntary Dissolution of Public Service Corporations."

COSTS:

Appeal and Error.—Where the appellees substantially prevailed in an inquiry before a commissioner, there was no error in

COSTS—Continued.**Appeal and Error—Continued.**

the adjudication of the court below of the costs against the appellant. *Harman v. Moss*, 399.

Attorney's Fees.—See **ATTORNEY'S FEES.**

COUNCIL. See **MUNICIPAL CORPORATIONS.**

COUNTIES.

Board of Supervisors.—See *infra*, "Compensation of County Officers."

Authority to Issue Bonds Mandatory or Permissive.—The title of an act was, "An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, or so much thereof as may be necessary," etc., and by the enacting clause the board was *authorized and empowered* to borrow \$90,000, or *so much thereof as may be necessary* for the purposes declared. This language is not equivocal, but is plain and unambiguous, and the circumstances of the case do not disclose any duty resting upon the board to exercise the power conferred. They were given a discretion in the matter, which they exercised when they refused to issue the bonds, and the lower court was without jurisdiction to set aside or annul their action *Board of Supervisors v. Cahoon*, 768.

Clerks of Court.—See **CLERKS OF COURT.**

Compensation of County Officers.—*Discretion of the Board of Supervisors.*—A board of supervisors may not withhold action fixing the amount of, or what is the same thing in effect, place a condition or conditions upon the payment of the salary or compensation allowed by law to an officer whose office or position is not created by the board of supervisors but by law. Such an office or position is not the creature of the board of supervisors but of the law. By the law, therefore, and not by the board of supervisors, except as they may act in accordance with the law, must the salary or compensation of such office or position be fixed. For any failure of such an officer to discharge his duties which are prescribed by law, the remedy of mandamus will lie. To allow boards of supervisors to withhold any action aforesaid, or to place a condition or conditions upon the payment of the salary or compensation aforesaid, would be to allow such boards to nullify the election of the officer to the extent of

COUNTIES—Continued.**Compensation of County Officers—Continued.***Discretion of the Board of Supervisors—Continued.*

the emoluments of the office allowed by law thus denied him. Board of Supervisors *v.* Coons, 783.

A board of supervisors undoubtedly has a discretion as to fixing the time or times of payment of salaries and allowances of county officers, if exercised for good and sufficient cause—such as the condition of the county treasury in the lack of funds to pay same at a certain time or times in the year, because of some situation against which the board did not and could not reasonably have been expected to provide in the next preceding laying of the county levy, or the like cause, operating impersonally. The board of supervisors of a county has no discretion to fix a different time of payment of the annual salary and other allowances provided for by law of a county clerk from the times of payment of salaries and allowances of other county officers allowed by law, on the ground that the clerk is not discharging or has not discharged his duty as such. Board of Supervisors *v.* Coons, 783.

The board of supervisors of a county has no discretion to refuse to act in fixing the compensation and other allowances of a county clerk allowed by law *at something*, within the limits prescribed by statute; nor, if it acts, to impose a condition or conditions upon the payment of such compensation, on the ground that the clerk has not performed, or is not performing his duties as such. Board of Supervisors *v.* Coons, 783.

County Officers.—See *infra*, "Compensation of County Officers."

Road Tax.—See TAXATION.

Taxation.—See TAXATION.

COURTS.

Clerks of Court.—See CLERKS OF COURT.

Docket.—Striking cases from docket for failure to prosecute.—
See DISMISSAL, DISCONTINUANCE AND NONSUIT.

Questions of Law and Fact.—See QUESTIONS OF LAW AND FACT.

Reinstatement of Cause.—See DISMISSAL, DISCONTINUANCE AND NONSUIT.

Resort to Court for Advice.—See TRUSTS AND TRUSTEES.

Vacation.—See CHAMBERS AND VACATION.

COVENANTS.

Covenant of Warranty.—See *infra*, "Warranty."

Estoppel.—See *infra*, "Warranty."

Warranty.—*Effect by Way of Estoppel.*—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which calls for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the "Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity." *Jennings v. Marston*, 79.

CREDITORS. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

CRIMINAL LAW.

Appeal and Error.—A denial of a constitutional right is, of itself, reversible error. *Pine v. Commonwealth*, 812.

Bill of Particulars.—See BILL OF PARTICULARS.

Confessions.—See CONFESSIONS.

Election.—Except in the single case of an indictment under the prohibition law, the law of this State is that there cannot be more offenses than there are counts in the indictment, and, if the Commonwealth offers evidence of more than one, the proper practice is for the defendant to ask the court to compel the Commonwealth to elect for which one it will prosecute. *Pine v. Commonwealth*, 812.

Inasmuch as Acts 1916, chapter 146, section 7, permits more than one offense to be charged in a single count, the

CRIMINAL LAW—Continued.**Election—Continued.**

defendant has not the absolute right to demand of the attorney for the Commonwealth that he should elect for which of the several offenses he would prosecute. He might desire to prosecute for more than one. It is a matter resting in the sound discretion of the trial court whether or not an election should be compelled. *Pine v. Commonwealth*, 812.

While the Commonwealth must be permitted to charge an offense in various ways to meet the evidence as it may be adduced on the trial, if, by reason of charging several distinct offenses widely separated by time, place and circumstances, the defendant will be seriously embarrassed in making his defense, whether the offense be felony or misdemeanor, an election should be compelled. *Pine v. Commonwealth*, 812.

Indictment and Information.—See **INDICTMENT AND INFORMATION.**

Intoxicating Liquors.—See **INTOXICATING LIQUORS.**

Physicians and Surgeons.—Accused, at the time of the prosecution, was a non-itinerant optician engaged in the practice of optometry, and had been so employed since the year 1884. He had the following display letters on the front door and windows of his place of business: "Dr. J. Harry Martin, Incorporated, Eyes Exclusively," and "Dr. J. Harry Martin, Incorporated, Optometrist." It did not appear that accused had ever practiced or offered to practice medicine or surgery either in the city of Roanoke or elsewhere. Held: The accused was exempt from prosecution under chapter 84, section 12, Acts 1916, pages 138, 147, as the accused was included in the exemption of section 11, of "any non-itinerant person or manufacturer who mechanically fits or sells lenses, artificial eyes, * * * or is engaged in the mechanical examination of eyes for the purpose of adjusting spectacles, eyeglasses or lenses; * * *." *Martin v. Commonwealth*, 808.

CROSSINGS.

Automobiles.—Degree of care required of Traveler. *Seaboard A. L. Ry. v. Abernathy*, 173.

Bridges.—See *infra*, "Private Crossings."

CROSSINGS—Continued.

Contributory Negligence.— See *infra*, "Last Clear Chance."

Although the giving of the instruction set out in headnote 2 was not reversible error, a better definition of ordinary care is that it means such care and caution as an ordinarily prudent and reasonable person would have exercised under the same circumstances, conditions and surroundings. *Seaboard A. L. Ry. v. Abernathy*, 173.

In an action for injuries sustained at a crossing, the court instructed that the jury could not find the plaintiff guilty of contributory negligence "if they believe from the evidence that in approaching said track and proceeding over said crossing, the plaintiff exercised such precaution for his safety as a person of ordinary prudence would have exercised under the circumstances disclosed by the evidence. Whether or not it was a lack of ordinary care, as defined in these instructions, on the part of the plaintiff, under the facts and circumstances disclosed by the evidence, not to have stopped before crossing the track on which he received the injury complained of, is a question of fact for the jury." While in many cases of accidents at crossings where the traveler's contributory negligence is manifest, such an instruction would be objectionable because misleading, it was, nevertheless, particularly applicable in this case, in which, in twelve instructions, the defendant company had presented to the jury its theory that plaintiff had been guilty of such contributory negligence as to bar his action. *Seaboard A. L. Ry. v. Abernathy*, 173.

It is not contributory negligence for the driver of an automobile not to stop upon the track between stationary cars, in an opening made in a train for the purpose of permitting travelers to cross that track, to look and listen for cars or trains approaching on another track on the further side of the opening. There can hardly be a more dangerous place for an automobile to stop than on a railroad track between cars recently uncoupled for the purpose of opening the highway. *Seaboard A. L. Ry. v. Abernathy*, 173.

It is the imperative duty of a traveler approaching a railway crossing to look and listen where looking and listening would be effective, and to stop if necessary in order to avoid a collision; and in many cases such an instruction as that set out in the second headnote might mislead the jury and induce them to ignore or disregard this rule. But in the instant case it was proper to instruct the jury as to the degree of care which the plaintiff should exercise in approaching this crossing at which his view was so obstructed that he

CROSSINGS—Continued.**Contributory Negligence—Continued.**

could not see from a place of safety, while the absence of noise from the detached cars rolling down grade made his listening ineffective, and where there was no safe place in which to stop in order to see, hear and take the necessary precautions. *Seaboard A. L. Ry. v. Abernathy*, 173.

The degree of care, which a traveler approaching a railway crossing is required to exercise, is ordinary care. *Seaboard A. L. Ry. v. Abernathy*, 173.

Verdict of jury conclusive as to. *Seaboard A. L. Ry. v. Abernathy*, 173.

County Road or Highway.—The word "county," as used in section 1294-d, clauses 38 and 39; Code of 1904, setting forth the duty of a railroad, crossing a "county road or highway," is used in the sense of an adjective and modifies or limits both "road" and "highway;" and from their collocation those words are the equivalent of "county road or county highway;" and a road dedicated by a plat to the public, but never accepted as such by the county authorities, is not a "county road or highway," as those terms are used in the statute. *Washington-Va. Ry. Co. v. Fisher*, 229.

Degree of Care Required of Traveler.—See *infra*, "Contributory Negligence."

Instructions.—See *infra*, "Contributory Negligence."

Last Clear Chance.—See **LAST CLEAR CHANCE**.

In an action for damages for injury to an automobile of plaintiff, by an express electric train of defendant, at a public road crossing, it appeared that when the train was about 1000 feet away from the crossing the motorman saw the plaintiff's automobile stop upon the track and could easily have stopped before reaching the crossing. There were superadded facts, plainly observable by the motorman, showing that the plaintiff was preoccupied and unconscious of his imminent peril. Held: That a verdict of the jury in favor of plaintiff must be sustained under the well-settled doctrine of the last clear chance. *Norfolk Sou. R. Co. v. Whitehead*, 139.

In an action for injuries to plaintiff's automobile by the train of defendant at a public crossing, where the doctrine of the last clear chance was applicable, a number of other questions were raised with respect to the negligence of defendant and the contributory negligence of the plaintiff in certain particulars. Held: That if both defendant and

CROSSINGS—Continued.

Last Clear Chance—Continued.

plaintiff were negligent in such matters respectively, it was manifest that none of them were the proximate cause of the injury, since the doctrine of the last clear chance was applicable. *Norfolk Sou. R. Co. v. Whitehead*, 139.

Negligence.—See *infra*, "Private Crossings."

New Trial.—In the instant case there was gross negligence on the part of the defendant company's servants in sending four cars down an incline without any efficient control. Just such an accident to some traveler upon the highway as happened might have been anticipated from such a movement, and the question of the plaintiff's contributory negligence was one about which fairminded men might honestly differ, and was, therefore, properly submitted to the jury. Where the negligence of defendant railroad is clearly established, and the question of the contributory negligence of the plaintiff is properly submitted to the jury, the verdict of the jury will not be set aside as contrary to the law and the evidence. *Seaboard A. L. Ry. v. Abernathy*, 173.

Private Crossings.—A crossing was constructed by a railroad company on the request of the landowner, whose property was intersected by the railroad, under section 1294-b, Code of 1904, satisfactory to the landowner, smooth and level over its entire width and fully up to the average crossing. No demand was made on the company that it should be *forty feet* wide, and it was put in strictly according to the agreement. Held: That the crossing was a private one. *Washington-Va. Ry. Co. v. Fisher*, 229.

If defendant had failed to comply with its statutory obligation to construct a sufficient number of wagon ways, plaintiff's remedy would have been to petition the circuit court for the appointment of commissioners to ascertain whether the additional ways asked for should be constructed, and not by action to recover damages. *Gaulding v. Virginian Railway Co.*, 19.

If defendant wished to escape liability for failure to keep the overhead bridge, as originally constructed, in good repair, it must have absolved itself from that duty by showing that it had in some lawful way been relieved of responsibility by providing other proper and suitable wagon ways. *Gaulding v. Virginian Railway Co.*, 19.

The statute measures the extent and obligation of the railroad with respect to it. The duty is owing to the landowner, and when that duty has been discharged according

CROSSINGS—Continued.**Private Crossings—Continued.**

to statutory requirement and is satisfactory to him, no one else can be heard to complain. The general public are not interested. The rights and remedies provided by section 1294-b are personal to the landowner, and if the public wish to acquire other or greater rights their remedy is under different statutes and by an essentially different procedure. If then a person other than the owner, or some one in privity with him, for his own convenience, elects to use such crossing and mishap befalls him, the company, in the absence of some further intervention on its part that proximately contributes to the accident, cannot be held liable therefor. *Washington-Va. Ry. Co. v. Fisher*, 229.

Code of 1904, section 1294-b (2) provides: "It shall be the duty of every railroad, canal or other public service corporation, whose road, canal, or works, passes through the lands of any person in this State, to provide proper and suitable wagon ways across said road, canal, or other works, from one part of said land to the other, and to keep such ways in good repair." In an action under this section the declaration of plaintiff alleged that the defendant, being the owner of a certain railroad running through the land of plaintiff, constructed an overhead bridge across its railroad to provide a means of passing from one part of the land to the other; that thereupon it became the duty of defendant to use reasonable care to keep and maintain the bridge in good repair; that defendant failed to perform its duty in that regard, and in consequence of such failure plaintiff suffered the damages laid in the declaration. Held: That these allegations are substantially in the terms of the statute and state a good cause of action. *Gaulding v. Virginian Railway Co.*, 19.

The contention of defendant, that the declaration should also have alleged that defendant failed to provide or to keep up other suitable wagon ways is without merit, it appearing that only one suitable way was necessary, and that the defendant had supplied it in accordance with the statute. The breach of duty lay in the failure of defendant to keep the way in good repair. There being none other, the only breach that could be assigned was with reference to the particular way in question. The duty to keep in good repair necessarily began when the duty to construct ended. *Gaulding v. Virginian Railway Co.*, 19.

CUMULATIVE EVIDENCE. See **NEW TRIALS**.

CURATOR. See EXECUTORS AND ADMINISTRATORS.

DAMAGES. See EXEMPLARY DAMAGES.

Abutting Owners.—See STREETS AND HIGHWAYS.

Automobiles.—In an action for damages sustained in a collision between plaintiff's Ford automobile and cars of defendant company at a crossing, the evidence was that the machine was "wrecked," and that all that was left of it was the engine and that had not been removed from the scene of the accident at the time of the trial. As the value of an engine of such an automobile, in such condition, may be said to be almost negligible, and there was no evidence of its salvage value offered, it was not reversible error to instruct the jury that if they should find for the plaintiff, in estimating his damages, they should take into consideration the value of the automobile which was "destroyed" at the time of the collision. *Seaboard A. L. Ry. v. Abernathy*, 173.

Avoidable Consequences.—See *infra*, "Consequential Damages."

Consequential Damages.—*Avoidable Consequences.*—A defendant, who without sufficient cause has breached his contract, cannot compel a plaintiff, who is in no default, to enter into a contract for the delinquent's protection, the hazard of which he is unwilling to incur. This would be a perversion of the doctrine of avoidable consequences. *Eastern, etc., Corp. v. Beazley*, 4.

The doctrine of avoidable consequences applies to consequential damages and not to direct damages flowing from a breach of contract. *Eastern, etc., Corp. v. Beazley*, 4.

Libel and Slander.—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

If defendants, in an action for libel, are not content to let the case stand upon the general damages presumed by law, but wish to rebut this presumption by questioning plaintiff

DAMAGES—Continued.**Libel and Slander**—Continued.

on cross-examination as to what actual injury plaintiff had in fact sustained by the libel, they have the right to do so, in diminution of damages. But having asked the question, they cannot object to an answer in direct response to the question. *Henry Myers & Co. v. Lewis*, 50.

In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where a libel is actionable *per se*, plaintiff is entitled to recover substantial, and even punitive damages, without any proof of particular instances of special damage. The law presumes general damages where the libel is actionable *per se*. *Henry Myers & Co. v. Lewis*, 50.

Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Mental Anguish.—There can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another. *Awtrey v. Norfolk & W. Ry. Co.*, 284.

Partnership.—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

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DAMAGES—Continued.**Partnership—Continued.**

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Streets and Highways.—See **STREETS AND HIGHWAYS.**

Trees and Timber.—See **TREES AND TIMBER.**

DAMS. See **MILLS AND MILLDAMS.**

DEAD BODIES.

Argumentativeness.—See *infra*, "Declaration."

Coroners.—See *infra*, "Right of Burial."

Declaration.—The declaration alleged that the employees of the defendant railway company discovered, and left where found, the dismembered portions of the body of deceased, plaintiff's son, on the company's right of way; that the railroad's employees found upon the body of deceased letters showing the address of his mother and brother; "and plaintiff avers that it became and was the duty of said defendant to follow up the information contained in said letters, and to notify deceased's said relatives, including plaintiff, of his death; to collect and prepare for burial, in a proper way, dismembered portions of the body of deceased; not to withhold from plaintiff the possession of said body; and to notify his said relatives, including plaintiff." Held: That the declaration was demurrable because argumentative. There is no allegation here of any withholding of the body, and indeed that allegation could not have been made under the admitted facts of the case. It is simply argued that by failing to notify the plaintiff the company thereby withheld the body. *Awtrey v. Norfolk & W. Ry. Co.*, 284.

DEAD BODIES—Continued.

Right of Burial.—The dead body of the son of the plaintiff was found upon the railroad of the defendant in a mutilated condition. At some time during the morning that the body was discovered it was taken charge of by the coroner, under the statute (Code, 1904, section 3938, amended Acts 1910, p. 338). After the coroner had completed his duties, he, as required by section 3946, Code, 1904, in view of the fact that the deceased was a stranger, caused his body to be decently buried. There were found on the body letters which indicated the address of the dead man's mother and brother in Georgia. The railway employees knew of these letters and replaced them upon the body. The coroner, in about two weeks, notified the relatives in Georgia, and the mother came to Virginia, disinterred the corpse and gave it burial in Georgia. Held: That under these facts an action for damages did not lie against the railway company. While there is a common law duty resting upon one who finds a dead stranger upon his premises to give him decent burial, it cannot be charged in this case that the company has failed in any such duty, because under the Virginia statute the coroner intervened and performed the duty which would otherwise have rested upon the company. *Awtrey v. Norfolk & W. Ry. Co.*, 284.

The near relatives of a deceased person have a legal right to the solace of burying the body, and any interference with that right, whether by mutilation of the body after death, or by withholding it from the relatives, is actionable. *Awtrey v. Norfolk & W. Ry. Co.*, 284.

DECLARATION. See **PLEADING**.

DECLARATIONS AND ADMISSIONS. See **CONFESSIONS**.

DEEDS. See **FRAUDULENT AND VOLUNTARY CONVEYANCES; VENDOR AND PURCHASER**.

Acknowledgments.—See **ACKNOWLEDGMENTS**.

Boundaries.—See **BOUNDARIES**.

Clerks of Court.—A county clerk is entitled to the fee allowed by section 3505, Code of 1904, for recording a deed to the county, notwithstanding a general allowance to the clerk for road services. *Board of Supervisors v. Coons*, 783.

Construction.—See **PARTITION; BOUNDARIES**.

DEEDS—Continued.

Estoppel.—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which calls for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the "Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity." *Jennings v. Marston*, 79.

Indexing.—See **CLERKS OF COURT**.

Lost Deeds.—See **LOST INSTRUMENTS AND RECORDS**.

Parol Evidence.—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury, or by the court, by the aid of extrinsic evidence. *Asberry v. Mitchell*, 276.

Purchaser for Value and Without Notice.—See **RECORDING ACTS; VENDOR AND PURCHASER**.

Recording Acts.—See **RECORDING ACTS**.

Tax Deed.—See **TAXATION**.

Variance Between Contract and Deed.—See **VENDOR AND PURCHASER**.

DEFENSE, AFFIDAVIT OF. See **ASSUMPSIT**.

DEMURRER.

Adultery.— See *infra*, "Divorce."

Divorce.—In the instant case, in a suit for divorce on the ground of adultery, the allegations of the bill in regard to the charge of adultery were held to sufficiently comply with the rule that the time, place and circumstances should be averred with reasonable certainty. *White v. White*, 244.

Multifariousness.—Where the trial court sustained a demurrer and entertained an amendment which showed that the complainants were bound to fail in their proof upon one branch of their case, it was error to dismiss the bill for multifariousness. The court ought to have treated as surplusage the allegations relating to this branch of the case or ought to have reserved to complainants the right to amend by striking out these allegations. *Matney v. Yates*, 506.

DEMURRER TO THE EVIDENCE.

Appeal and Error.—The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor. Accordingly, where the plaintiff assigns as error the action of the court below, first, in setting aside a verdict in his favor, and, second, in sustaining defendant's demurrer to the evidence, the appellate court will consider only the action of the court below upon the demurrer to the evidence. *Wadkins v. Damascus Lumber Co.*, 691.

Inconsistencies in the Evidence.—Where the testimony of some of the plaintiff's witnesses was not altogether consistent with the testimony of the plaintiff himself, upon a demurrer to the evidence, these inconsistencies must be resolved in favor of the plaintiff, as the jury might have properly so found. *Lynchburg Foundry Co. v. Dalton*, 480.

Motion to Set Aside Verdict.— See *infra*, "Appeal and Error."

Record.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

DEMURRER TO THE EVIDENCE—Continued.

When Demurrer Overruled.—Upon a demurrer to the evidence, if under the evidence the jury might have found for the plaintiff, had the case not been withdrawn from their consideration by the demurrer to the evidence, then the court must so find. *Kabler's Adm'r v. Southern Ry. Co.*, 90.

DEPOSITIONS.

Appeal and Error.—The exclusion by the court below of a deposition of a witness is harmless, there being nothing to indicate that the commissioner did not consider the deposition in making up his report; and, the appellate court having considered it, being of the opinion that it could not in any event have properly changed the result. *Maddux v. Buchanan*, 102.

Divorce.—See **DIVORCE**.

DETINUE.

Trees and Timber.—See **TREES AND TIMBER**.

DISCONTINUANCE. See **DISMISSAL, DISCONTINUANCE AND NON-SUIT**.

DISMISSAL, DISCONTINUANCE AND NONSUIT.

Appeal and Error.—A bill was filed by a judgment creditor against the administrator and heirs of the deceased debtor, to subject her land to the lien of the judgment. The bill alleged that the debtor owned no personal property at the time of her death, out of which the judgment could be collected. The administrator and one of the heirs filed separate pleas of the statute of limitations. At the hearing the complainant asked leave to dismiss his suit as to his administrator, which motion the administrator resisted. The court, however, permitted the dismissal. Held: That the administrator was a proper party and the suit should not have been dismissed as to him. But the error in permitting complainant to dismiss as to the personal representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator. *Johnston v. Pearson*, 453.

Orders.—In order to enter valid orders a court must have jurisdiction of the cause in which such orders are entered, and no valid orders can be entered in a case which has been once finally disposed of, unless it has been first legally reinstated. *Snead v. Atkinson*, 182.

DISMISSAL, DISCONTINUANCE AND NONSUIT—Continued.

Reinstatement.—In a suit regarding lands, a consent decree was entered awarding the complainant a writ of possession for the lands, and retiring the cause from the docket, with leave to either party to reinstate upon reasonable notice to the adverse party. Twenty years or more afterwards notice was issued by the wife of the original complainant, not a party to the suit, addressed to the defendants in the original suit and appellant, not a party to that suit, that she would move the court to reinstate the cause in order that she might obtain from the court an order for a writ of possession of the land. Upon this notice and without other allegations, or evidence, the court entered a decree awarding the writ of possession asked for. Held: Error upon the part of the court. The proceeding under the notice was neither a suit in equity, an action at law, nor based upon any statute. The wife of the original complainant was not a party to the original suit; neither was the appellant. Whatever the effect, if any, of the leave given to either party to reinstate the suit in the original decree, such privilege could only have been exercised within a reasonable time, and by one of the parties to the original suit. The court had no jurisdiction over either the party seeking to reinstate the cause or the appellant, nor over the land apparently involved in the controversy. The decree, therefore, was void. *Peters v. Peters*, 559.

Striking Cause from Docket.—A cause stricken from the docket under section 3312, Code of 1904, cannot be reinstated after the lapse of one year, except by consent of all parties. A decree striking a cause from the docket is an adjudication that everything has been done in the cause that the court intends to do. The decree may be erroneous, but the error does not render it less final, and the court having by its order put the cause beyond its control, cannot upon a discovery of error recall it in a summary way and resume a jurisdiction which has been exhausted. *Snead v. Atkinson*, 182.

An equity court will always consider the substance and not the form. This doctrine is a wholesome one and is favored by courts of equity, but always for the purpose of promoting substantial justice, never for the purpose of perpetrating a wrong in the name of equity. In the instant case a suit to enforce a judgment lien was stricken from the docket, the original judgment debtor was dead; and all the parties familiar with the facts were dead, except the creditor. The lands in question had been acquired by the appellants

DISMISSAL, DISCONTINUANCE AND NONSUIT—Continued.**Striking Cause from Docket—Continued.**

and improvements had been made upon them, and they had held their lands under title derived from the judgment debtor or his heirs at law for more than fifteen years, during which time the judgment creditor had slept upon his rights. Held: That the above doctrine of equity could not be invoked in favor of the judgment creditor. His delay in asserting his lien has been unexplained by him, and because of the death of the debtor and of those familiar with the subject matter in his lifetime is now inexplicable. One who has been silent when he should have spoken will not be permitted to speak when he should be silent. *Snead v. Atkinson*, 182.

DISSEIZIN. See ADVERSE POSSESSION.

DISSOLUTION OF PUBLIC SERVICE CORPORATIONS. See CORPORATIONS.

DISTRESS.

Ejectment.—In an action of ejectment by a landlord against his tenant where the amount of the rent exceeded the value of all the personal property on the premises, the failure of an instruction to refer to the remedy by distress is immaterial. *Matoaka Coal v. Clinch Valley Min.*, 522.

DIVORCE.

Adultery.—See *infra*, "Appeal and Error;" "Witnesses."

Confession of adultery must be voluntary. *Lewis v. Lewis*, 99.

Evidence held not sufficient to sustain charge of adultery. *Lewis v. Lewis*, 99.

Evidence to sustain the charge of adultery must be clear and convincing. *Lewis v. Lewis*, 99.

In the instant case, in a suit for divorce on the ground of adultery, the allegations of the bill in regard to the charge of adultery were held to sufficiently comply with the rule that the time, place and circumstances should be averred with reasonable certainty. *White v. White*, 244.

Sufficiency of evidence to support. *White v. White*, 244.

Appeal and Error.—In an action for divorce for adultery, the establishment of the charge of adultery depended on the testimony of two small boys, children of the parties, aged, respectively, nine and twelve years. The Supreme Court of Appeals refused to sustain an assignment of error that the

DIVORCE—Continued.**Appeal and Error—Continued.**

court below erred in holding that the evidence was sufficient to sustain the charge of adultery. While expressing regret that children of any age, and especially those of such tender years, should be involved as witnesses in cases of this character, the court was constrained, as was the court below, upon a careful consideration of the record, to the conclusion that the testimony of these two boys was substantially true. *White v. White*, 244.

Bill.— See *infra*, "Demurrer."

Condonation.—Condonation is a matter of specific affirmative defense which must be specially pleaded, and the burden of proof is upon the defendant. The court may upon its own motion deny a divorce, even in the absence of any pleading setting up the defense, if it appears from the record that the injured party has condoned the acts complained of; but this eminently proper rule cannot be successfully invoked in the instant case, where the defense was neither pleaded nor proved, the evidence not disclosing the fact of condonation so as to warrant the court to act upon its own motion. *White v. White*, 244.

Innocence and condonation are thoroughly inconsistent defenses, and while it has been held that they may both be interposed in the same suit, the purpose of making both must not be left to doubtful inference. *White v. White*, 244.

Confessions.—Confession of adultery must be voluntary. *Lewis v. Lewis*, 99.

Cruelty.—See *infra*, "Witnesses."

Defenses.—See *infra*, "Condonation."

Demurrer.—In the instant case, in a suit for divorce on the ground of adultery, the allegations of the bill in regard to the charge of adultery were held to sufficiently comply with the rule that the time, place and circumstances should be averred with reasonable certainty. *White v. White*, 244.

Depositions.—See *infra*, "Witnesses."

Evidence.—Evidence held not sufficient to sustain charge of adultery. *Lewis v. Lewis*, 99.

Evidence to sustain the charge of adultery must be clear and convincing. *Lewis v. Lewis*, 99.

DIVORCE—Continued.

Innocence.—Innocence and condonation are thoroughly inconsistent defenses, and while it has been held that they may both be interposed in the same suit, the purpose of making both must not be left to doubtful inference. *White v. White*, 244.

Pleading.—See *infra*, "Condonation."

Presumptions and Burden of Proof.—See *infra*, "Condonation."

Witnesses.—In a suit for divorce on the grounds of cruelty and adultery, the reading of the deposition of the complainant was assigned as error. It was conceded that the witness would have been competent if the suit had been based solely on the charge of cruelty, but it was contended that as he was not competent to testify upon the charge of adultery, he was incompetent for all purposes. The deposition, with the exception of a statement by witness that he had not condoned his wife's infidelity, dealt entirely with the charge of cruelty, and the decree complained of was based solely on the charge of adultery. Held: That as the statement, which tended to negative condonation, might be disregarded without affecting the correctness of the decree, the question of the competency of the witness was immaterial. *White v. White*, 244.

DOCKET.

Reinstatement.—See DISMISSAL, DISCONTINUANCE AND NONSUIT.

Striking from Docket.—See DISMISSAL, DISCONTINUANCE AND NONSUIT.

DOCUMENTARY EVIDENCE.

Book Entries.—Where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the exception to the hearsay rule of books of original entry, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. *French v. Virginian R. Co.*, 383.

Execution and Proof of Documents.—See EXECUTION AND PROOF OF DOCUMENTS.

DOCUMENTARY EVIDENCE—Continued.

Train Sheets.—In the case at bar the train sheets were verified by the claim adjuster, an employee of the defendant company, who testified that he had obtained them from the proper custody, and that they were the original train sheets. Held: That as there was nothing in the record to indicate any doubt of the fact that they were the genuine records under which the trains were operated, they were admissible. While they should have been proved by the train dispatchers who kept them, failure to do so affected, not their admissibility, but their credibility. *French v. Virginian R. Co.*, 383.

Records of entries made in the established course of business on train sheets by train dispatchers from reports telegraphed or telephoned to them by station agents as to the time of arrival and departure of trains are admissible as evidence to indicate the location of a train at a certain time, when verified by the train dispatcher in whose office they were lodged. *French v. Virginian R. Co.*, 383.

Verification.—See *infra*, "Train Sheets."

DOMICIL.

Definition.—*Cooper's Adm'r v. Commonwealth*, 338.

Presumptions and Burden of Proof.—It being established that from his childhood to 1905 a person's domicile was in another State, the burden is upon those who allege change of domicile to establish it. *Cooper's Adm'r v. Commonwealth*, 338.

DUE DILIGENCE. See **NEW TRIALS.**

EASEMENTS.

Vendor and Purchaser.—Where an easement of a telephone company to maintain its telephone line erected along the margin of the land, which was the subject of an executory contract of sale, was visible upon the land at the time the contract was made, the purchaser is presumed to have taken into consideration the existence of this encumbrance in fixing upon the amount of the purchase money. And where such easement was not an injury, but a benefit to the market value of the land, it cannot be considered to be an encumbrance of which the vendee could complain. *Sachs v. Owings*, 162.

EJECTMENT.

Common Source of Title.—Conveyances from the same grantor of separate tracts of land, although they may be adjoining

EJECTMENT—Continued.**Common Source of Title.—Continued.**

tracts, do not necessarily constitute, in contemplation of law, a common source of title. The terms, "common grantor" and "common source of title," are not always synonymous and interchangeable, although in most cases the facts are such that the two terms do mean the same thing. *Jennings v. Marston*, 79.

The rule that a plaintiff in ejectment need not trace title back of the common source rests upon the principle of estoppel, the defendant not being allowed the inconsistency of claiming both under and against the same title. But the inconsistency must be actual and substantial; and when it affirmatively appears that the real dispute is as to the location of a boundary line between two distinct tracts, one of which the common grantor derived from one source and conveyed to the plaintiff, and the other of which he derived from another source and conveyed to the defendant, there is no inconsistency and, therefore, no estoppel to prevent the defendant from denying that the plaintiff's grantor has title to the land in dispute. *Jennings v. Marston*, 79.

Deed of Trust.—See *infra*, "Mortgages and Deeds of Trust."

Distress.—In an action of ejectment by a landlord against his tenant where the amount of the rent exceeded the value of all the personal property on the premises, the failure of an instruction to refer to the remedy by distress is immaterial. *Matoaka Coal v. Clinch Valley Min.*, 522.

Estoppel.—See *infra*, "Common Source of Title."

Grantor, Common.—See *infra*, "Common Source of Title."

Landlord and Tenant.—In an action of ejectment by a landlord against his tenant where the amount of the rent exceeded the value of all the personal property on the premises, the failure of an instruction to refer to the remedy by distress is immaterial. *Matoaka Coal v. Clinch Valley Min.*, 522.

Mortgages and Deeds of Trust.—An outstanding unsatisfied mortgage or deed of trust on land to secure a debt is regarded as a mere lien, and the mortgagor or grantor may still maintain ejectment in his own name, and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action. While technically the legal title is in the trustee, it is only vested in him for a definite purpose, namely, to secure the debt. Such a deed should be construed in actions of ejectment as a mere lien upon the property. *Gravatt v. Lane*, 44.

Outstanding Deed of Trust.—See *infra*, "Mortgages and Deeds of Trust."

EJECTMENT—Continued.

Parties to Action.—One operating mines under a contract with a lessee which gave him exclusive possession thereof for the time being, but whose possession was not exclusive of and was subordinate to the possession of the entire tract by the lessee, is not the party actually occupying the premises, as those terms are used in section 2726, Code of 1904. *Matoaka Coal v. Clinch Valley Min.*, 522.

Section 2726 of the Code of 1904 provides: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff may also at the discretion of the plaintiff be named defendants in the declaration." Prior to the amendment of this section by the act of February 26, 1896 (Acts 1895-6, p. 514), it directed that "the person actually occupying the premises shall be named defendant in the declaration." The purpose of the amendment seems to have been to permit the plaintiff to join with the occupant as defendants any other persons claiming title to the land; and it may be conceded that the actual occupant is always a necessary party defendant to an action of ejectment in the sense that another defendant may by timely and proper procedure compel the plaintiff to bring the occupant before the court. The presence of the occupant, however, is not essential to the jurisdiction of the court, and if the claimant of the premises who is sued does not appropriately raise the point, and defends the action upon the merits, he is bound by the judgment. *Matoaka Coal v. Clinch Valley Min.*, 522.

Where the plaintiff in actions *ex delicto* improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions *ex contractu*. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement. Consequently, defendant in ejectment under the general issue has no right to raise the question of the failure of the plaintiff to name as defendant the person actually occupying the premises. *Matoaka Coal v. Clinch Valley Min.*, 522.

Plaintiff's Title.—See *infra*, "Common Source of Title"

EJECTMENT—Continued.**Plaintiff's Title—Continued.**

In an action of ejectment the plaintiff must recover upon the strength of his own title, which he must connect with the Commonwealth, or with a common source with that of the defendant. There are exceptions to the rule, but the case at bar does not fall within any of them. The defendant, for example, was not a mere trespasser or intruder but held a deed for the land under which he was exercising the acts of ownership and possession resulting in this suit. *Jennings v. Marston*, 79.

Pleas.—Section 2734 of the Code of 1904, restricting defendants in ejectment to the plea of the general issue, refers only to pleas in bar and does not preclude pleas in abatement. *Matoaka Coal v. Clinch Valley Min.*, 522.

Title.—See *infra*, "Common Source of Title," "Plaintiff's Title."

ELECTION. See CRIMINAL LAW.

ELECTION OF REMEDIES.

Election between Counts.—See CRIMINAL LAW.

Trees and Timber.—Every trespass consisting in the cutting of standing trees is in its nature an injury to real estate and the owner, besides his remedies in equity in proper cases, has the election to so treat the trespass and bring his action for damages to the market value of the land (where he is the owner of the land) or to the market value of the standing trees, if he owns only the latter. In such case the common law action of trespass *quare clausum fregit*, or (under statute, section 2901, Code of 1904) the same action on the case, is an appropriate remedy at law. The damages to the real estate may, however, be waived by the owner by his election to bring an action at law for the trees themselves, severed from the land, or for their value, as having been converted into some form of personal property. In this State, in the former case, detinue is the proper remedy, and, in the latter case, trover (the gist of which is the conversion), or a like action of trespass on the case for the conversion of the trees. *Wood and Others v. Weaver*, 250.

ELECTRICITY.

Instructions.—In an action for the death of a servant from contact with an electric wire, an instruction that it was the duty of the master to use care commensurate with the danger to inspect and maintain its wire is not erroneous, although there was no allegation in the declaration charging failure to inspect. The declaration charged that it was the

ELECTRICITY—Continued.**Instructions—Continued.**

duty of the company to use reasonable care to maintain the wire in a safe position, and the breach of that duty. The duty to inspect was a minor incident to the principal duty of properly maintaining the wire, and did not call for special averment. *Virginia Iron, etc., Co. v. Prophet*, 685.

Mines and Minerals.—A mining company is guilty of actionable negligence in suffering an electric wire to remain detached from its original fastenings, which held it in a safe position, and in permitting it to sag to such an extent as to become dangerous to its employees, where if the company had used ordinary care to inspect the mine, the dangerous condition of the wire would have been discovered, and where the attention of the "mine boss" in charge of the entry, where the wire was strung, had been specifically drawn to the situation. In the case at bar, it was the duty of the company to have warned plaintiff's intestate, its employee, of the unusual and extraordinary danger to which he was exposed by the sagging wire, and its negligence was the efficient and proximate cause of his death. *Virginia Iron, etc., Co. v. Prophet*, 685.

ENCUMBRANCES. See **VENDOR AND PURCHASER.**

EQUITABLE MAXIMS. See **MAXIMS.**

EQUITY.

Adequate Remedy at Law.—See **ADEQUATE REMEDY AT LAW.**

Answer.—See **ANSWERS.**

Bill.—See *infra*, "Prayer for General Relief."

Divorce.—See **DIVORCE.**

Multifariousness.—See **MULTIFARIOUSNESS.**

Taxation.—Bill in equity does not lie for taxes erroneously assessed and collected. *Barrow v. Prince Edward Co.*, 1.

Variance.—See **VARIANCE.**

Bill of Review.—See **BILL OF REVIEW.**

Commissioner in Chancery.—See **MASTER IN CHANCERY.**

Jurisdiction.—See **JURISDICTION.**

Lost Instruments and Records.—See **LOST INSTRUMENTS AND RECORDS.**

Marriage Settlements.—Jurisdiction of equity over controversies touching marriage settlements. *Gooch v. Suhor*, 35.

Where the court was not exerting its general equity jurisdiction, but merely discharging the limited functions of a

EQUITY—Continued.**Marriage Settlements—Continued.**

probate court in the matter of appointing an administrator or curator for an estate, it was plainly right in refusing to take cognizance of a dispute over the validity of an antenuptial agreement. *Gooch v. Suhor*, 35.

Master in Chancery.—See **MASTER IN CHANCERY**.

Maxims.—See **MAXIMS**.

Multifariousness.—See **MULTIFARIOUSNESS**.

Multiplicity of Suits.—See **MULTIPLICITY OF SUITS**.

Parties.—See **PARTIES**.

Partition.—See **PARTITION**.

Pleading.—A court of equity can decree only upon the case made by the pleadings. This is especially true where fraud is relied on as established by the proof. It must be distinctly alleged in the pleadings, otherwise it cannot be the basis of any decree. *Fleenor v. Hensley*, 367.

In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

Prayer for General Relief.—A prayer for general relief should never be omitted in any bill in equity, for the reason that if the special relief prayed for cannot be given, the court may under the prayer for general relief grant proper relief consistent with the case made by the bill. *Steinman v. Clinchfield Coal Corp.*, 611.

A prayer to subject land to the payment of a judgment carried with it necessarily an implied prayer to do whatever else was necessary and proper for the enforcement of the lien of the judgment upon the land. The removal of a cloud occasioned by the loss of the judgment debtor's deed was an essential step in subjecting the land to the payment of the judgment. *Steinman v. Clinchfield Coal Corp.*, 611.

This principle is so well known in the profession that it is difficult to believe that a lawyer of any experience would prepare a bill omitting the prayer for general relief, and as it is so universally inserted, it is likely that in taking a memorandum from the bill no particular attention would be paid to its insertion. *Steinman v. Clinchfield Coal Corp.*, 611.

EQUITY—Continued.

Sales.—See **VENDOR AND PURCHASER.**

Specific Performance.—See **SPECIFIC PERFORMANCE.**

Trusts and Trustees.—See **TRUSTS AND TRUSTEES.**

Variance.—See **VARIANCE.**

Vendor and Purchaser.—See **VENDOR AND PURCHASER.**

ESTATES. See **JOINT TENANTS AND TENANTS IN COMMON.**

Jus Disponendi.—See **WILLS.**

Parceners.—See **PARCENARY, ESTATES IN.**

ESTOPPEL.

Covenant of Warranty.—See *infra*, “**Warranty.**”

Deeds.—A tract of land described in the declaration in an action of ejectment was known as the “Badkins Tract,” and its southern boundary, as called for in all of the deeds in evidence describing the same, was the “Cranston Mill-pond.” This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the “Badkins Tract.” The plaintiff’s ultimate contention, denied by the defendant, is that the deeds under which she claims and which calls for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the “Badkins Tract” did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff’s grantor was made merely for the purpose of securing a debt, contained no warranty of title, and “the grantor undertook no responsibility either as to title or quantity.” *Jennings v. Marston*, 79.

Ejectment.—See **EJECTMENT.**

Inconsistent Positions.—One of the complainants in a suit to subject lands to the lien of judgments held by the complainants against one P. in a former suit had alleged that the property belonged to one B. It had received the benefit of that litigation and applied the proceeds of the sale of the property to the satisfaction of its judgment against B. and hence was precluded from assuming an inconsistent position in the instant case to the prejudice of the purchaser under decrees in the former suit. *Vicars v. Weisiger Cl Co.*, 679.

ESTOPPEL—Continued.

Master and Servant.—The acceptance by a servant of payments made him by his master, accompanied by the statements of account contained in remittance statements, does not estop him from drawing a larger salary per month than that shown to be due him by the remittance statements, unless the master was misled thereby to its prejudice, in that it was thus led to continue the employment of plaintiff beyond the term it was legally bound to continue it. *Norfolk Hosiery Co. v. Westheimer*, 180.

Mortgages and Deeds of Trust.—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which call for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the "Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity." *Jennings v. Marston*, 79.

Warranty.—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which call for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the

ESTOPPEL—Continued.**Warranty**—Continued.

"Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity." *Jennings v. Marston*, 79.

EVIDENCE. See PAROL EVIDENCE; VARIANCE.

Adultery.—See DIVORCE.

Best and Secondary Evidence.—See BEST AND SECONDARY EVIDENCE.

Book Entries.—See DOCUMENTARY EVIDENCE.

Burden of Proof.—See PRESUMPTIONS AND BURDEN OF PROOF.

Character in Evidence.—See WITNESSES.

Confessions.—See CONFESSIONS.

Conflicting Evidence.—See APPEAL AND ERROR; NEW TRIAL.

Constitutional Law.—*Power of Legislature as to Rules of Evidence.*—Section 55 of the prohibition act, Acts 1916, page 215, declaring that the possession of certain quantities of liquor shall be *prima facie* evidence of a purpose of sale, merely establishes a rule of evidence; and that such rules may be established by the legislature is well settled. *Pine v. Commonwealth*, 812.

Demurrer to the Evidence.—See DEMURRER TO THE EVIDENCE.

Directors.—See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Divorce.—See DIVORCE.

Documentary Evidence.—See DOCUMENTARY EVIDENCE.

Examination of Witnesses.—See WITNESSES.

Exceptions and Objections.—See APPEAL AND ERROR.

Execution and Proof of Documents.—See EXECUTION AND PROOF OF DOCUMENTS.

Fraudulent and Voluntary Conveyances.—See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Instructions.—See INSTRUCTIONS.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Lost Instruments and Records.—See LOST INSTRUMENTS AND RECORDS.

Newly Discovered Evidence.—See NEW TRIALS.

Parol Evidence.—See PAROL EVIDENCE.

Presumptions and Burden of Proof.—See PRESUMPTIONS AND BURDEN OF PROOF.

EVIDENCE—Continued.

Privileged Communications.—See WITNESSES.

Sales.—See SALES.

Secondary Evidence.—See BEST AND SECONDARY EVIDENCE.

Train Sheets.—See DOCUMENTARY EVIDENCE.

Usages and Customs.—See USAGES AND CUSTOMS.

Verification.—See DOCUMENTARY EVIDENCE.

Witnesses.—See WITNESSES.

EXCEPTIONS AND OBJECTIONS. See APPEAL AND ERROR.

EXCEPTIONS, BILL OF.

Abolition.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

EXECUTION AND PROOF OF DOCUMENTS.

Statute Dispensing with Proof of Execution.—Where an answer sets up a title bond as a source of title and files the bond as a part of the answer, the execution and delivery of the title bond not being denied, no other evidence of its execution is necessary under section 3279, Code of 1904. *Robinet v. Taylor*, 588.

EXECUTIONS.

Homestead Exemption.—See HOMESTEAD EXEMPTION.

Return.—A valid return may be made after the day to which the execution is returnable. In the case at bar, the executions were returned "no effects" two days after the return day. This was clearly within a reasonable time, and, therefore, the returns were made in the lawful performance of a delayed duty. Such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions. *Moorman v. Campbell County*, 112.

In a suit to subject the land of a deceased debtor to a judgment lien, one of the heirs filed a plea of the statute of limitations, setting forth that only one execution had issued on the complainant's judgment within ten years from its date, and that the execution so issued was returnable more than ninety days from its date, and hence was void. Held: That an execution returnable more than ninety days from its date was not merely voidable, so that its invalidity

EXECUTIONS—Continued.**Return—Continued.**

could not be set up in a suit to enforce the judgment, but was void; and that fact might be shown by anybody, anywhere and at any time. *Johnston v. Pearson*, 453.

Section 3220 of the Code of 1902 provides that process, whether original, mesne or final, shall be returnable within ninety days after its date, and that process shall be issued before the rule day to which it is returnable, but may be executed on or before that date. All three kinds of process are embraced in the same class and put upon exactly the same footing, and, it having been determined that original and mesne process returnable more than ninety days after its date is void, final process, or process of execution, must share the same fate. *Johnston v. Pearson*, 453.

Mandamus to Compel.—*Moorman v. Campbell County*, 112.

Time of Issuance.—As used in section 3577, Code of 1904, providing that on a judgment execution may issue within a year, *may* is permissive, whereas *shall* as used in section 3220 of the Code, providing that process shall be returnable within ninety days after its date, was mandatory. *Johnston v. Pearson*, 453.

EXECUTORS AND ADMINISTRATORS.

Curator.—There is not necessarily any incompatibility in the office of trustee under an antenuptial settlement and that of curator of the estate of the deceased husband, pending the determination of the validity of the antenuptial settlement. *Gooch v. Suhor*, 35.

Equity Jurisdiction.—The estate of an intestate was being fully administered by a court of equity. All of the persons interested in the funds were before the court, and there were no other claimants thereof, nor any intervening liens or equities in favor of any other persons. The court directed that the entire interest of an heir and distributee, in the personal as well as in the real estate, should be applied towards the satisfaction of judgments against him, upon which no executions had issued. The continuing right to issue executions upon the judgments was clear. It was argued that this was error, because, there being no valid execution outstanding, there was no specific lien upon the distributee's interest in the personal estate. Held: That the action of the court might be justified upon two grounds: First, that the court having acquired jurisdiction could retain it and do complete justice between the parties; and secondly, that as it appeared that the attorneys of the distributee and heir had a lien for their fees

EXECUTORS AND ADMINISTRATORS—Continued.**Equity Jurisdiction—Continued.**

upon his entire interest, both real and personal, and the lien of the judgments being only upon the real property, the court, if necessary, would have marshalled the assets and applied the fund arising from the personal estate, first, towards the satisfaction of the lien of the attorneys for their fees so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments. *Moorman v. Campbell County*, 112.

Marshaling Assets.—See MARSHALING ASSETS.

Parties to Action.—As the personal property of the decedent is the primary fund for the payment of his debts, his personal representative is a necessary party to a suit by which such fund is affected. He is a proper party to a suit by a judgment creditor to subject his debtor's lands to the lien of his judgment; but where the pleadings admit that the debtor died without personal assets and no relief is sought against his personal representative and no accounting by him is asked, he is not a necessary party. *Johnston v. Pearson*, 458.

Persons Who May Be Appointed Administrators.—Plaintiff in error by an antenuptial settlement relinquished all her marital rights to her husband's property, therefore, unless and until the settlement is cancelled and annulled, neither she nor any other person designated by her, has the right of administration of his estate under section 2639 of the Code of 1904. *Gooch v. Suhor*, 35.

Where the petition of plaintiff in error to be permitted to qualify as administratrix, and attacking the validity of her antenuptial settlement, neither made parties nor prayed that those representing adverse interests to the petitioner might be convened, and no process was awarded or issue joined thereon, and concluded with the request that if the court should be of opinion that it was without jurisdiction to pass upon the validity of the antenuptial agreement in the probate case, it would appoint her nominee curator of the estate pending proceedings by her to determine the validity of the contract, the state of the pleadings was prohibitive against the assumption by the court of jurisdiction to determine the validity of the antenuptial settlement. The petition was not a pleading either in form or substance, but a mere motion in writing or application to the court that plaintiff in error, or her nominees, be allowed to administer on the estate. *Gooch v. Suhor*, 35.

Resort to Court for Direction and Advice.—A bill of conformity filed by the curator of an estate, praying the instruction

EXECUTORS AND ADMINISTRATORS—Continued.**Resort to Court for Direction and Advice—Continued.**

and guidance of the court in the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges cannot be safely disposed of except by the direction of the court, in nowise contravenes a supersedeas order in a collateral suit involving the estate. The object of the bill is to preserve the property of the estate pending litigation for whomsoever shall ultimately be adjudged the rightful owner. Such is the common practice with trial courts in this jurisdiction. *Gooch v. Old Dominion Trust Co.*, 29.

As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealings with the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they are entitled to direction and instruction from the court. Whenever a case occurs which justifies the proceedings, trustees, by bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event. *Gooch v. Old Dominion Trust Co.*, 29.

Who May Be Appointed Administrator.—See *infra*, "Persons Who May Be Appointed Administrators."

EXEMPLARY DAMAGES.

Libel and Slander.—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where a libel is actionable *per se*, plaintiff is entitled to recover substantial, and even punitive damages, without

EXEMPLARY DAMAGES—Continued.**Libel and Slander—Continued.**

any proof of particular instances of special damage. The law presumes general damages where the libel is actionable *per se*. *Henry Myers & Co. v. Lewis*, 50.

Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Partnership.—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

EXEMPTION. See **HOMESTEAD EXEMPTION.**

EXPRESSIO UNIUS. See **CONSTITUTIONAL LAW.**

FELLOW SERVANTS.

Vice-Principal.—In the instant case the safe appliance doctrine imposed upon the defendant the duty of using ordinary care to furnish the plaintiff, as stable boss, with a reasonably safe mule in connection with the discharge of the duties imposed upon him by that employment, and the defendant's foreman in discharging or failing to discharge such duties of defendant company was not the fellow servant of the plaintiff but a vice-principal for whose negligence, if any, the defendant is liable to plaintiff if it was the proximate cause of his injury, and plaintiff himself was free from negligence. *Turner v. Richmond & R. R. Co.*, 194.

Mere superiority in rank of a foreman put in charge of a gang of hands does not *per se* affect his relation of fellow servant to those working under him. But a different prin-

FELLOW SERVANTS—Continued.**Vice-Principal—Continued.**

ciple applies where the foreman is engaged in the discharge of a non-assignable duty for the master. In the latter case, he is not a fellow servant but a vice-principal. *Turner v. Richmond & R. R. Co.*, 194.

The duty of giving suitable special orders necessary to the safety of the service is enumerated as one of the non-assignable duties of the master. Any servant to whom that duty is delegated is, while engaged in its performance, a vice-principal. *Lynchburg Foundry Co. v. Dalton*, 480.

Who Are.—Employees of a foundry engaged in loading iron pipe upon a railroad car are fellow servants, and if one of them is injured through the negligence of the other, he cannot recover from the master. *Lynchburg Foundry Co. v. Dalton*, 480.

FINAL JUDGMENTS AND DECREES. See **APPEAL AND ERROR; FORMER ADJUDICATION OR RES ADJUDICATA.**

“Law of the Case.”—*Steinman v. Clinchfield Coal Corp.*, 611.

FLOODING LANDS. See **WATER AND WATERCOURSES.**

FORFEITURE. See **MILLS AND MILLDAMS.**

Mining Lease.—See **MINES AND MINERALS.**

FORMER ADJUDICATION OR RES ADJUDICATA. See “**LAW OF THE CASE.**”

Court of Foreign Jurisdiction.—A judgment of the United States Circuit Court of Appeals which remanded the case to the district court “for further proceedings in accordance with the views herein expressed,” is not a final judgment. *Steinman v. Clinchfield Coal Corp.*, 611.

Final Judgments.—A judgment of the United States Circuit Court of Appeals which remanded the case to the district court “for further proceedings in accordance with the views herein expressed,” is not a final judgment. *Steinman v. Clinchfield Coal Corp.*, 611.

A reversal in a court of last resort *remanding a cause*, cannot be set up as a bar to a subsequent action for the same cause. *Steinman v. Clinchfield Coal Corp.*, 611.

In order for a judgment to constitute *res judicata*, it must be a final judgment in the case on the merits. *Steinman v. Clinchfield Coal Corp.*, 611.

FORMER ADJUDICATION OR RES ADJUDICATA—Continued.

Jurisdiction of Court in First Case.—Sometimes even between the same parties and relating to the construction of the same instrument, the first judgment is neither *res judicata*, nor the "law of the case." It must appear not only that the question was the same in both cases, but that the court in the first suit had power and jurisdiction to determine the question. *Steinman v. Clinchfield Coal Corp.*, 611.

Parties and Privies.—One who has succeeded to the right, title or interest of another in real estate is a privy in estate, and is bound by judgments and decrees against his grantor. The judgment disposes of the rights of the parties and is a matter of public record. Its effect cannot be impaired by any subsequent transfer by the defendant. This must of necessity be true. There would be no end of litigation if the effect of a judgment or decree could be avoided by a simple transfer of the property by the unsuccessful litigant as soon as an adverse judgment or decree was rendered. Decrees are rendered every day construing contracts, deeds, wills and other documents, and such decrees bind not only the parties to the litigation, but all persons claiming under them, with or without notice of the decree. The privies can stand on no higher footing than their principals. *Steinman v. Clinchfield Coal Corp.*, 611.

Judgments bind the actual parties to the suit, whether they were necessary parties or simply proper parties. *Steinman v. Clinchfield Coal Corp.*, 611.

Parties to judgments and decrees, and their privies, are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself. *Steinman v. Clinchfield Coal Corp.*, 611.

Privies.—See *infra*, "Parties and Privies."

Stare Decisis.—Closely akin to the doctrine of *res judicata* is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own, though it is at times confused with one or the other of the other two. *Steinman v. Clinchfield Coal Corp.*, 611.

FRAUD AND DECEIT. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Pleading.—A court of equity can decree only upon the case made by the pleadings. This is especially true where fraud is relied on as established by the proof. It must be distinctly alleged in the pleadings, otherwise it cannot be the basis of any decree. *Fleenor v. Hensley*, 367.

FRAUD AND DECEIT—Continued.**Pleading—Continued.**

In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

Release.—The court instructed the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request. *The Ferries Co. v. Brown*, 13.

Trusts and Trustees.—A court of equity will not enforce a trust created for an illegal or fraudulent purpose. *Fleenor v. Hensley*, 367.

In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

FRAUDS, STATUTE OF.

Contract for Gift to Be Perfected by Will.—See *infra*, "Parol Gift of Land."

Landlord and Tenant.—Where a tenant enters under a lease void under the statute of frauds because not under seal and for a longer term than five years (section 2413, Code of 1904), the tenancy is one from year to year. But in the instant case, where the lease was for succeeding terms of one year each, renewable at the option of the lessee, this rule does not apply. *Marks v. Gorla Bros.*, 491.

FRAUDS, STATUTE OF—Continued.

Parol Gift of Land.—In the case at bar, it was contended on behalf of the appellant that section 2413 of the Code of 1904 had no application, because the alleged contract was based upon a valuable consideration, to-wit: the complainant's change of position by leaving his own farm and bestowing his labor and care upon that of another, and the sale of his own land and application of the proceeds to improvements upon the place with reference to which he had a parol contract. But in this respect, the case cannot be distinguished in principle from *Halsey v. Peters*, 79 Va. 60, the doctrine of which and the other Virginia cases of that type, section 2413 of the Code of 1904 was expressly designed to abolish. *Wohlford v. Wohlford*, 699.

Prior to May 1, 1888, the date upon which the Code of 1887 took effect, a parol gift or a promise of a gift of land, to be consummated by deed, if followed by improvements on the land, was enforceable under the doctrine of such cases as *Halsey v. Peters*, 79 Va. 60; and a contract for a gift to be perfected by will, under similar circumstances, was enforceable under the doctrine announced in *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741. But in view of the history and apparent purpose of section 2413 of the Code of 1904, which first made its appearance in the Code of 1887, no such contract is now enforceable. That section provides that no right to a conveyance of an estate of inheritance or freehold, or for a term of more than five years in lands, shall "accrue to the donee of the land, or those claiming under him, under a gift or promise of gift of same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee, or those claiming under him." *Wohlford v. Wohlford*, 699.

Resulting Trusts.—See *infra*, "Trusts and Trustees."

Trusts and Trustees.—Where a principal, having no interest in the land to be purchased, makes a verbal contract with an agent to buy for him, and the latter purchases in his own name and with his own funds and then repudiates the agency and refuses to convey to the principal, the question whether the contract is within the statute of frauds and not enforceable against the agent, depends upon whether the contract in its essence and effect was one of agency, or was it one for the purchase of real estate. If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals and the contract is within the statute

FRAUDS, STATUTE OF—Continued.**Trusts and Trustees—Continued.**

and can only be established by such a writing as will meet the requirements thereof. *Matney v. Yates*, 506.

Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money. *Matney v. Yates*, 506.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

Deed of Trust Reserving Power of Sale to Grantor.—A deed of trust provided that until default should be made in the payment of the principal or interest of any of the bonds secured by it, the trustee should permit the grantor to sell the property covered by the deed, provided, however, that in the event of a sale of the property, the proceeds should be reinvested in other property, which should immediately become subject to the deed of trust. Held: That the absolute power of sale reserved to the grantor in the deed, as a matter of law, rendered it *per se* fraudulent and void under section 2458 of the Code of 1904. *Cons'd't Tramway Co. v. Germania Bk.*, 331.

Evidence.—A suit was instituted for the purpose of subjecting certain lands to the lien of the judgments held by the complainants against P. and the bill alleged that P., at the time of and subsequent to the rendition of their judgments, was the true owner thereof, having paid all the purchase money therefor, and that the legal title thereto had been conveyed to his wife in fraud of his creditors, who had conveyed it to others, under whom defendants claimed. The evidence submitted as to the fraud upon P.'s creditors, if promptly presented, might have been sufficient to have shifted the burden of proof to him, but presented as it was twenty years after the occurrences referred to, after P. has been a fugitive from justice for many years, and, according to one witness, was *now* dead, was utterly insufficient to support a decree against an innocent purchaser for value without notice. *Vicars v. Weisiger Clo. Co.*, 679.

Subsequent and Existing Creditors.—Transactions which are condemned by section 2458 of the Code of 1904, may be impeached by both prior and subsequent creditors, while such as are included in section 2459 of the Code of 1904 can only be set aside at the suit of existing creditors. Section

FRAUDULENT AND VOLUNTARY CONVEYANCES.—Continued.

Subsequent and Existing Creditor.—Continued.

2458 deals with fraudulent acts that are void and, therefore, its operation is not limited to any particular class of creditors. It applies alike to all creditors who are delayed, hindered or defrauded of their rights by the device of the grantor, whether they be existing or subsequent creditors. On the other hand, section 2459 deals with gifts, conveyances, etc. that are voluntary or upon consideration of marriage, which are only declared to be void as to "creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted * * * after it was made; and though it be decreed to be void as to prior creditors, because voluntary or upon consideration of marriage, it shall not for the cause be decreed to be void as to subsequent creditors." Cons'd't

Tramway Co. v. Germania Bk., 331.

GENERAL INDEX SYSTEM. See, CLERKS OF COURT.

GENERAL RELIEF. See EQUITY.

GIFTS.

Causa Mortis.—Delivery of possession, of this subject of the gift by the donor in his lifetime, is essential to the perfection of a gift *causa mortis*. *Shankle v. Spahr*, 598.

In gifts *inter vivos* a mere declaration of a donor, after words of donation, in a previously acquired possession of the donee, has been held to be sufficient evidence from which to imply a delivery of the possession by the donor to the donee as such; but this relaxation of the rule with respect to delivery of possession in cases of gifts *inter vivos* has never been extended to gifts *causa mortis*. *Shankle v. Spahr*, 598.

The rules of law on the subject of gifts *causa mortis* are well settled; if such a gift falls within those rules, it is the duty of the courts to sustain it, but for reasons of public policy, such rules should not be extended or relaxed. *Shankle v. Spahr*, 598.

The subject of the alleged gift in the instant case was a small piece of land, and the property was not too valuable to require a formal delivery and acceptance. Such a delivery would not be required in the usual case established by the decisions applicable to personal property of that char-

HEARSAY EVIDENCE—Continued.**Arbitration and Award—Continued.**

the agreement and by a third party as arbitrator. The award contained no mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evidence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission. Held: That the writing was no part of the award and was inadmissible as hearsay. *Fraley v. Nickels*, 377.

HIGHWAYS. See **STREETS AND HIGHWAYS.**

HOLDING OVER. See **LANDLORD AND TENANT; MASTER AND SERVANT.**

HOMESTEAD EXEMPTION.

Fiduciary Debt.—Where complainant under the circumstances set out in the second headnote agreed that defendant should have one-third of the profits of the resale of land purchased at a judicial sale, although there arose from the transaction a fiduciary relationship and not a mere contract of employment between complainant and defendant, complainant was not such a fiduciary as is contemplated by the statute, Code of 1904, section 3630, clause 3, which provides that the homestead exemption shall not extend to any execution or process on a demand "for liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law for money received." A recital in the decree, therefore, against complainant, "homestead exemption waived by reason of the fact that this is a fiduciary debt due" from complainant to defendant is improper, and the decree should be corrected in this respect; but the error is probably harmless, since the record not only indicates that complainant is abundantly solvent, but also that the recovery complained of is now secured by an ample supersedeas bond, so that there is no reasonable probability that his homestead will ever be attacked to satisfy the decree. *Alexander v. Critcher*, 723.

IMPLIED CONTRACTS. See **STREET RAILROADS.**

Material Used.—A school board contracted for the construction of a school building. The contractor entered into a contract with the plaintiff to furnish a certain part of the building material for a certain sum. Before the material was delivered the contractor became bankrupt and refused to receive it. Plaintiff then notified the carrier's agent to hold the shipments and not to deliver to any one except upon a written order. Notwithstanding this notice, the carrier delivered the material to an agent of the trustee in bankruptcy of the contractor, who contemplated the completion of the contract with the school board. But the trustee abandoned this idea and so notified the parties in interest, relinquishing his claim for the materials; whereupon the school board proceeded itself to complete the building, using the material in question, with knowledge of all the facts. There was evidence indicating an express promise to pay for the material by the school board, but however that might be, the law will imply a promise by the board to pay for the building materials used. The plaintiff's right to recovery did not depend upon the exercise of the right of stoppage *in transitu*. *School Board v. Saxon Lime, etc., Co.*, 594.

INCUMBRANCES. See **VENDOR AND PURCHASER.**

INDEPENDENT CONTRACTOR.

Assignments.—See **ASSIGNMENTS.**

INDEXING. See **CLERKS OF COURT.**

INDICTMENT AND INFORMATION.

Bill of Particulars.—See **BILL OF PARTICULARS.**

Constitutionality of Statute.—Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, plea, motion or otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time. *Pine v. Commonwealth*, 812.

INDICTMENT AND INFORMATION—Continued

Election.—See CRIMINAL LAW—Continued

Indicting Inquiries.— *Charging More Than One Offense in a Single Count.* In the absence of statutory regulation, while any number of misdemeanors of the same nature and punishable in the same manner may be charged in the same indictment, there must be a separate count for each offense, and a defendant cannot be convicted of more offenses than there are counts, and it follows that the defendant cannot lawfully be charged with more than one offense in a single count. *Pine v. Commonwealth*, 812. — *Wis.*

Section 7, Acts 1916, page 215, prescribing a form of indictment under the prohibition act, which shall be sufficient in effect declares that more than one offense arising under the statute may be charged in a single count. The power of the legislature to change rules of procedure is unquestionable, except as restrained by the Constitution, and there is no good reason why it may not provide that what has heretofore required several counts in an indictment may now be accomplished by a single count, provided the prisoner is not unlawfully prejudiced thereby. If the prisoner is not prejudiced, it is a matter of mere procedure and clearly within the province of the legislature. The prisoner is not so prejudiced if he is fully put upon notice of the cause and nature of the offense with which he is charged, and is afforded ample opportunity to make his defense. *Pine v. Commonwealth*, 812.

Prescriptiveness of Statutory Form. An indictment following the statutory form as set out in section 7 of the prohibition act, Acts 1916, page 215, undertaking to charge the defendant with one of the offenses included in sections 3, 4 and 5 of the act, does not fully inform the defendant "with clearness and certainty" of the cause and nature of his offense. *Pine v. Commonwealth*, 812.

Ordinarily. The acts should be charged, but it is not given the defendant the necessary information in the function of an indictment to charge facts and not legal conclusions. *Pine v. Commonwealth*, 812.

Requisites and Sufficiency. An indictment following the statutory form as set out in section 7 of the prohibition act, Acts 1916, page 215, undertaking to charge the defendant with all of the first offenses under sections 3, 4 and 5 of the act does not fully inform the defendant "with clearness and certainty" of the cause and nature of his accusation. *Pine v. Commonwealth*, 812.

A defendant, civil as well as criminal, is a person haled into court has the right to demand that his indictment, in plain,

INDICTMENT AND INFORMATION—Continued.**Requisites and Sufficiency—Continued.**

intelligible language what is the cause of the complaint against him; and this right, in so far as it relates to crimes, is guaranteed by both the federal and State Constitutions. *Pine v. Commonwealth*, 812.

Ordinarily, the acts done should be charged, in order to give the defendant the necessary information. It is the function of an indictment to charge facts and not legal conclusions. *Pine v. Commonwealth*, 812.

Waiver.—*Cause and Nature of Accusation.*—While the Constitution guarantees to every man the right to demand "the cause and nature of his accusation," it does not prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment or information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand "the cause and nature of his accusation." If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and which he will be held to have waived unless he asserts it. *Pine v. Commonwealth*, 812.

INFANTS.

Judgments and Decrees.—Under statutes similar to section 3424, Code 1904, even in cases where infants were defendants, as a general rule, it has been held that they are as much bound by decrees as an adult, and can only impeach them for causes for which an adult could, such as fraud, collusion, error, or the like. With stronger reason must this be true when the decree is in favor of the infant and in a suit in which he is plaintiff. *Asberry v. Mitchell*, 276.

Specific Performance.—An infant can compel specific performance of a contract for the conveyance of land to him, made with an adult, based on the consideration that the infant should pay all expenses of the adult at a hospital and maintain him during his natural life, which covenants the infant had performed. *Asberry v. Mitchell*, 276.

Want of mutuality is said to be the only reason assigned why a court of equity will not decree specific performance of a contract at the suit of an infant. And where at the time of the institution of the suit for specific performance, the infant has fully performed the contract on his part, there is no want of mutuality of obligation and remedy, and specific performance may be rightly decreed. *Asberry v. Mitchell*, 276.

INJUNCTION.

Laches.—Where a contract for grading a street was executed September 14th, work commenced about September 22d, and an injunction granted September 29th, there was no such unreasonable delay in applying for the injunction as should bar the complainant of relief. *Appalachia v. Mainous*, 666.

INNOCENT PURCHASER. See RECORDING ACTS; VENDOR AND PURCHASER.

INSANITY.

Collateral Attack.—See *infra*, "Sale of Land."

Committee.—See *infra*, "Sale of Land."

Partition.—See *infra*, "Sale of Land."

Sale of Land.—The interest of one of the heirs of a decedent was sold pursuant to the prayer of a petition filed in a partition suit by her brother, who claimed to be her committee. The evidence of his appointment as such was unsatisfactory and the evidence of her insanity wholly insufficient. This latter fact, in itself, constituted a fatal defect in the proceedings by the alleged committee; and, moreover, those proceedings were wholly wanting in some of the jurisdictional requirements of the statute (Code, chapter 117) relating to the sale of lands of persons under disability. The sale, therefore, was void and subject to collateral attack. *Roberts v. Hagan*, 573.

Wills.—See WILLS.

INSTRUCTIONS.

Appeal and Error.—See APPEAL AND ERROR.

Crossings.—See CROSSINGS.

Curative Effect of Instructions.—Although an instruction, standing alone, may have been misleading, the verdict of the jury will not on that account be set aside, when it appears that the objection thereto was corrected by other instructions given by the court. In other words, instructions in a given case are to be read as a whole, and when so read, if it can be seen that the instructions could not have misled the jury, their verdict will not be disturbed, even though one or more of the instructions were defective. Defects in one instruction may be cured by a correct statement of the law in another. *Eastern, etc., Corp. v. Beazley*, 4.

Erroneous instruction cured by another.—*Eastern, etc., Corp. v. Beazley*, 4.

Electricity.—See MASTER AND SERVANT.

Evidence.—See *infra*, "Must Be Based on Evidence."

INSTRUCTIONS—Continued.

Repetition of Instructions—Continued.

you should find them not guilty." *Pine v. Commonwealth*, 812.
 The omission from one instruction of a correct statement of the law applicable to the facts of the case is harmless where the same principle was embodied in plain and unmistakable language in other instructions given. *Eastern, etc., Corp. v. Beazley*, 4.

Where, in a prosecution under the prohibition act the court instructed the jury as follows: "The court instructs the jury that if they believe from the evidence that the defendants purchased the liquor prior to November 1, 1916, and had it for their own use and not to sell and did not sell the same, they should find them not guilty," it is not error to refuse, at the request of defendants, the following instruction: "The court instructs the jury that if they believe from the evidence that the defendants had the liquor in their possession prior to November 1, 1916, at which time the present liquor law came into effect, then such possession creates no presumption against them." If the second instruction be conceded to be a correct statement of the law, defendants could not have been injured by its refusal as the first instruction, given at their instance, stated the law as favorably to them as they were entitled to. *Pine v. Commonwealth*, 812.

Where the instructions, as a whole, fully and correctly expounded the law upon every material question in the case, more cannot be required of the trial court. *Sutherland v. Commonwealth*, 643.

INTERLOCKS. See **PUBLIC LANDS**.
INTERPRETATION AND CONSTRUCTION. See **CONSTITUTIONAL LAW**; **CONTRACTS**; **USAGES AND CUSTOMS**; **WILLS**.

Lease.—See **LANDLORD AND TENANT**.

State and Federal Statutes.
INTOXICATING LIQUORS.
 Constitution of 1902, section 62, of the Constitution of 1902, provides that the General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors. This section does not authorize the enactment of a single law the legislature might not have enacted if the section had not been adopted.

INTOXICATING LIQUORS—Continued.

Constitutional Law—Continued.

It is simply declaratory of the existing law, but thereby inviting attention to the subject. Complete authority over the whole subject of intoxicating liquors has not been taken away from the legislature by an express provision, nor by necessary implication, and the maxim *expressio unius est exclusio alterius* does not apply. *Pine v. Commonwealth*, 812.

The Supreme Court of Appeals is of opinion that the purpose of the act is a wise one, but even if it were of a different opinion, it could make no difference in the result so long as it is within the legislative power, for judicial opinions of expediency cannot be substituted for the will of the legislature when constitutionally expressed. *Pine v. Commonwealth*, 812.

Mapp Act.—The provisions of the act of Assembly approved March 10, 1916 (Acts 1916, page 215), commonly known as the prohibition act, so far as called in question in this case, are not forbidden by section 62 of the Constitution of this State. *Pine v. Commonwealth*, 812.

Power of Legislature as to Regulations in Regard to Intoxicating Liquors.—In this State, from the earliest date to the adoption of the present Constitution, the legislature has exercised uncontrolled power over the manufacture and sale of intoxicating liquors, and since local option and dispensary laws have come into vogue, has exercised undisputed authority and control over these subjects also, and it would require very plain language in a constitutional provision to indicate that it was the purpose of the constitutional convention to take away from the legislature a power exercised by the legislatures of the other States of the Union, and one that has been within the province of the legislature of this State from the earliest date. *Pine v. Commonwealth*, 812.

Evidence.—See *infra*, "Instructions."

On the trial of the violation of the prohibition act, two witnesses testified that they had bought liquor from the defendants, and that they also bought liquor from one T. The defendants offered T. as a witness, and proved by him that the prosecuting witnesses had not bought any liquor from him. The defendants then offered to prove by T. that the prosecuting witnesses broke open his house, broke into his trunk and took out a gallon of whiskey. Held: That the latter evidence was irrelevant. *Pine v. Commonwealth*, 812.

INTOXICATING LIQUORS—Continued.**Evidence—Continued.**

Possession as *prima facie* evidence.—See *infra*, "Possession as *Prima Facie* Evidence."

Indictment and Information.—Charging More Than One Offense in a Single Count.—In the absence of statutory regulation, while any number of misdemeanors of the same nature and punishable in the same manner may be charged in the same indictment, there must be a separate count for each offense, and a defendant cannot be convicted of more offenses than there are counts, and it follows that the defendant cannot lawfully be charged with more than one offense in a single count. *Pine v. Commonwealth*, 812.

Section 7, Acts 1916, page 215, prescribing a form of indictment under the prohibition act, which shall be sufficient, in effect declares that more than one offense arising under the statute may be charged in a single count. The power of the legislature to change rules of procedure is unquestionable, except as restrained by the Constitution, and there is no good reason why it may not provide that what has heretofore required several counts in an indictment may now be accomplished by a single count, provided the prisoner is not unlawfully prejudiced thereby. If the prisoner is not prejudiced, it is a matter of mere procedure and clearly within the province of the legislature. The prisoner is not so prejudiced if he is fully put upon notice of the cause and nature of the offense with which he is charged, and is afforded ample opportunity to make his defense. *Pine v. Commonwealth*, 812.

Sufficiency of Statutory Form.—An indictment following the statutory form, as set out in section 7 of the prohibition act, Acts 1916, page 215, undertaking to charge the defendant with all of the first offenses under sections 3, 4 and 5 of the act, does not fully inform the defendant "with clearness and certainty" of the "cause and nature of his accusation." *Pine v. Commonwealth*, 812.

Instructions.—In a prosecution under the prohibition act, defendants requested the court to instruct the jury that notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt, still, if the evidence shows that the liquor was purchased before November 1, 1916, and stored away by the defendants for their own use, then the *prima facie* evidence is overcome and the Commonwealth must prove by clear, distinct and reliable evidence that the defendants had the liquor for the illegal purpose mentioned in the indictment. Held: If there was any error in refusing this instruction,

INTOXICATING LIQUORS.—Continued.

Instructions.—Continued.

it was harmless as the court had already given, at the instance of the defendants, the following instruction which sufficiently protected their rights: "The court instructs the jury that notwithstanding the fact that possession of more than one gallon of liquor constitutes *prima facie* evidence of guilt still if you believe from the evidence that the liquor was purchased before November 1, 1916, and stored away by the defendants for their own use, you should find them not guilty." Pine v. Commonwealth, 812.

Where in a prosecution under the prohibition act the court instructed the jury as follows: "The court instructs the jury that if they believe from the evidence that the defendants purchased the liquor prior to November 1, 1916, and had it for their own use and not to sell and did not sell the same they should find them not guilty." it is not error to refuse, at the request of defendants, the following instruction: "The court instructs the jury that if they believe from the evidence that the defendants had the liquor in their possession prior to November 1, 1916, at which time the present liquor law came into effect, then such possession creates no presumption against them." If the second instruction be conceded to be a correct statement of the law, defendants could not have been injured by its refusal, as the first instruction, given at their instance, stated the law as favorably to them as they were entitled to. Pine v. Commonwealth, 812.

Instructions Read in Light of the Evidence.—In a prosecution under the prohibition act, the jury were instructed, amongst other things, that if they believed that the defendants kept or stored ardent spirits for sale or to give away they would be as guilty as if they had actually sold or given away ardent spirits. Although under different circumstances this instruction would be misleading, if not erroneous, as the act allows gifts in one's own home, but as instructions must be read in the light of the evidence offered on the trial, and in the instant case the evidence was of a sale and not of a gift, and at a restaurant and not in a home, the instruction could not have misled the jury. Pine v. Commonwealth, 812.

Possession as Prima Facie Evidence.—Section 55 of the prohibition act, Acts 1916, page 215, declaring that possession of certain quantities of liquor should be *prima facie* evidence that the one in possession had the same for sale, makes no distinction as to the time of the acquisition of the liquor,

Possession as Prima Facie Evidence—Continued

JOINDER OF PARTIES TO ACTION. See **ABATEMENT**, **REVIVAL**

ment is required to give notice to subsequent purchasers, but the bookkeeping of a judgment against a judgment debtor is not required to be made in the public records.

JOINT TENANTS, AND TENANTS IN COMMON.

The possession of a joint tenant, tenant in common or

It follows that the possession of one is never adverse to the

title of the other, unless there be proved an actual ouster
or disseisin or other act amounting to a total denial of the

Partitions of South Park, Colorado, 1907

Real Estate Brokers.—A broker or agent guilty of bad faith to

his principal forfeits all commissions or compensation for his services. But in the case at bar where the appellant,

under agreement with his co-tenants, under which he made the sale of timber in question, believed he occupied the re-

lation of an optionee purchaser and not that of broker for his cotenants; he is not entitled of freehold which is his right from

recovering compensation for the sale, in representing to his

actually received by him when he believed that his per-

personal services, money expended, a right of way over his own land; and other considerations were worth all the pur-

chase price over and above the price named by him to his co-tenants. Harmon & Moss, 299

CHASER UNDER DECREE IN THE FORMER SUIT. *Weisiger*
JUDGMENTS AND DECREES

Appeal and ~~Final~~ ^{Final} Judgment by Appellate Court, to-wit: I.

evident that a new trial will not avail the plaintiff any-

JUDGMENTS AND DECREES—Continued.**Appeal and Error—Continued.**

thing, the Supreme Court of Appeals will enter such judgment as the court below should have entered in favor of the defendant. *Louisville & Nashville R. Co. v. Rieley*, 469.

Chambers and Vacation.—Final decrees in vacation ought to guard against cutting off the opportunity for amendment. *Matney v. Yates*, 506.

Section 3293 of the Code of 1904, giving the court "control over all proceedings in the office during the preceding vacation," has no application to vacation decrees entered pursuant to provisions of section 3427 of the Code of 1904, providing for the submission of motions, actions at law and chancery causes for decision in vacation. *Matney v. Yates*, 506.

Docketing and Indexing Judgments.—The docketing of a judgment is required to give notice to subsequent purchasers, but the docketing of a judgment against the judgment debtor gives no notice of the lien of the judgment upon land, the legal title to which stands in the name of another. *Vicars v. Weisiger Clo. Co.*, 679. See **CLERK OF COURT**.

Final Judgments and Decrees.—See **APPEAL AND ERROR**.

Former Adjudication or Res Adjudicata.—See **FORMER ADJUDICATION OR RES ADJUDICATA**.

Infants.—Under statutes similar to section 3424, Code 1904, even in cases where infants were defendants, as a general rule, it has been held that they are as much bound by decrees as an adult, and can only impeach them for causes for which an adult could, such as fraud, collusion, error, or the like. With stronger reason must this be true when the decree is in favor of the infant and in a suit in which he is plaintiff. *Asberry v. Mitchell*, 276.

Judgment Liens.—*Estoppel.*—One of the complainants in a suit to subject lands to the lien of judgments held by the complainants against one P. in a former suit had alleged that the property belonged to one B. It had received the benefit of that litigation and applied the proceeds of the sales of the property to the satisfaction of its judgment against B. and hence was precluded from assuming an inconsistent position in the instant case to the prejudice of the purchaser under decrees in the former suit. *Vicars v. Weisiger Clo. Co.*, 679.

"Law of the Case."—See **"LAW OF THE CASE."**

JUDGMENTS AND DECREES—Continued.

Limitation of Actions.—A valid return may be made after the day to which the execution is returnable. In the case at bar, the executions were returned "no effects" two days after the return day. This was clearly within a reasonable time, and, therefore, the returns were made in the lawful performance of a delayed duty. Such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions. *Moorman v. Campbell County*, 112.

Lis Pendens.—See **LIS PENDENS**.

Parties to Action.—In a bill to subject land to the payment of a judgment against C., it was alleged that F., the former owner of the land, had conveyed the land to C., but that the deed had been lost. F. was directly interested to show that the land had not been paid for, or that he had not made any deed. The decree made in the case which set up the lost deed and subjected the land as the land of C. would not have been binding upon F. if he had not been a party to the suit, and he was at least a proper party, if not a necessary party, so as to give him an opportunity of defending his title, or if he admitted the conveyance of the title, to preclude him in the future and those claiming under him, from gainsaying C.'s title to the land. *Steinman v. Clinchfield Coal Corp.*, 611.

Presumptions and Burden of Proof.—There is a presumption in favor of the decree of a trial court, and this presumption is entitled to especial consideration when the decree is based on uncertain and conflicting testimony. *Alexander v. Critcher*, 723.

Privies.—See **FORMER ADJUDICATION OR RES ADJUDICATA**.

Recording Acts.—See **RECORDING ACTS**.

Parties to judgments and decrees, and their privies, are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself. *Steinman v. Clinchfield Coal Corp.*, 611.

Res Judicata.—See **FORMER ADJUDICATION OR RES JUDICATA**.

Suit for the Recovery of Land.—A suit to subject land to the payment of a judgment is not a suit for the recovery of land, and section 2510 of the Code of 1904, providing for the record of any recovery of land under judgment or decree, has no application to the decree rendered therein. *Steinman v. Clinchfield Coal Corp.*, 611.

JUDGMENTS AND DECREES—Continued.

Upon Whom Binding.—See FORMER ADJUDICATION OR RES ADJUDICATA.

JUDICIAL SALES AND RENTINGS. See PARTITION.

Ascertainment of Liens.—It is premature and erroneous to order a judicial sale to satisfy encumbrances on land before ascertaining the liens binding the land, their amounts and respective priorities. *Steinman v. Clinchfield Coal Corp.*, 611.

Liens.—See *infra*, "Ascertainment of Liens."

Removal of Cloud.—There is no subject about which the courts are more careful than that of judicial sales. It is the effort of the courts at all times to see that the land is brought to the hammer under the most advantageous circumstances so as to realize the best price that can be obtained therefor, and to protect the interests of all parties, and it has been held that before a sale of land is decreed any cloud on the title or any impediment to a fair sale ought to be removed as far as it is practicable to do so. *Steinman v. Clinchfield Coal Corp.*, 611.

JURISDICTION.

Equity.—Where the court was not exerting its general equity jurisdiction, but merely discharging the limited functions of a probate court in the matter of appointing an administrator or curator for an estate, it was plainly right in refusing to take cognizance of a dispute over the validity of an antenuptial agreement. *Gooch v. Suhor*, 35.

Adequate Remedy at Law.—See ADEQUATE REMEDY AT LAW.

Administration of Estates.—The estate of an intestate was being fully administered by a court of equity. All of the persons interested in the funds were before the court, and there were no other claimants thereof, nor any intervening liens or equities in favor of any other person. The court directed that the entire interest of an heir and distributee, in the personal as well as in the real estate, should be applied towards the satisfaction of judgments against him, upon which no executions had issued. The continuing right to issue executions upon the judgments was clear. It was argued that this was error, because, there being no valid execution outstanding, there was no specific lien upon the distributee's interest in the personal estate. Held: That the action of the court might be justified upon two grounds: First, that the court having acquired jurisdiction could retain it and do complete justice between the parties; and secondly, that as it appeared that the at-

JURISDICTION—Continued.**Equity—Continued.***Administration of Estates—Continued.*

torneys of the distributee and heir had a lien for their fees upon his entire interest, both real and personal, and the lien of the judgments being only upon the real property, the court, if necessary, would have marshalled the assets and applied the fund arising from the personal estate, first, towards the satisfaction of the lien of the attorneys for their fees so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments. *Morman v. Campbell County*, 112.

Complete Relief.—Equity has jurisdiction of a bill to enforce a judgment lien under section 3571, Code of 1904, and having acquired jurisdiction for this purpose, it will go on and do complete justice between the parties, even to the extent of enforcing purely legal demands of which it would not otherwise have jurisdiction. *Steinman v. Clinchfield Coal Corp.*, 611.

Where a court of equity acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end. *Moorman v. Campbell County*, 112.

Jurisdiction over Marriage Settlements.—*Gooch v. Suhor*, 35.

Lost Instruments and Records.—See LOST INSTRUMENTS AND RECORDS.

Resort to Court for Advice.—A bill of conformity filed by the curator of an estate, praying the instruction and guidance of the court in the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges cannot be safely disposed of except by the direction of the court, in no wise contravenes a supersedeas order in a collateral suit involving the estate. The object of the bill is to preserve the property of the estate pending litigation for whomsoever shall ultimately be adjudged the rightful owner. Such is the common practice with trial courts in this jurisdiction. *Gooch v. Old Dominion Trust Co.*, 29.

As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealings with the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they are entitled to direction and in-

JURISDICTION—Continued.**Equity—Continued.*****Resort to Court for Advice—Continued.***

struction from the court. Whenever a case occurs which justifies the proceedings, trustees, by bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event. *Gooch v. Old Dominion Trust Co.*, 29.

***Stock Subscriptions.*—See STOCK AND STOCKHOLDERS.**

Moot Question.—The appellee, who is the owner and occupant of a dwelling house, obtained a decree enjoining the appellant and a laundry company from maintaining a nuisance in so using the steam laundry, located within one hundred feet of the appellee's dwelling, as to cause smoke, cinders, gases, etc., to be emitted therefrom and cast over the premises of the appellee. Appellant was the owner and lessor of the laundry building, and, as his co-defendant, the laundry company, had dismantled and removed the smoke-stack, boiler and furnace of the laundry, thus complying with the decree complained of, a motion to dismiss the appeal must be sustained, as the matter in controversy between the parties is terminated, and any opinion or decision that the Supreme Court of Appeals might deliver would be upon a moot question. *Garrett v. Smead*, 390.

Orders.—In order to enter valid orders a court must have jurisdiction of the cause in which such orders are entered, and no valid orders can be entered in a case which has been once finally disposed of, unless it has been first legally reinstated. *Snead v. Atkinson*, 182.

Probate.—*Disputes over the Validity of Antenuptial Contracts.*
Gooch v. Suhor, 35.

JURY AND JURY TRIAL.

Demurrer to the Evidence.—See DEMURRER TO THE EVIDENCE.

Questions of Law and Fact.—See QUESTIONS OF LAW AND FACT.

LACHES.

One who has been silent when he should have spoken will not be permitted to speak when he should be silent. *Snead v. Atkinson*, 182.

Injunction.—Where a contract for grading a street was executed September 14th, work commenced about September 22d, and an injunction granted September 29th, there was no such unreasonable delay in applying for the injunction as

LACHES—Continued.**Injunction—Continued.**

should bar the complainant of relief. *Appalachia v. Mainous*, 666.

Prosecuting Pending Cause.—Failure of other heirs to prosecute a suit for partition of a tract of land for more than thirty years, against a coheir in possession under a contract of sale, which contract he claimed to have performed on his part, bars them from relief in another suit for the same purpose, where testimony of importance has been lost by the delay. *Baber v. Baber*, 740.

The same rule with respect to laches being a bar to the institution of a suit in equity applies to the right to further prosecute a pending cause. While mere lapse of time will not make this rule applicable, where the delay results in the death of parties and the loss of evidence, rendering it difficult to do justice between the parties, a court of equity will hold it too late to ascertain the merits of the controversy and will not interfere whatever may have been the original justice of the claim. Accordingly a court of equity will, in such case, refuse to grant relief in a cause which has been long pending, although originally instituted in due time, equally as it will in such case, refuse to grant relief in a newly instituted suit. *Baber v. Baber*, 740.

LANDLORD AND TENANT.

Construction of Lease.—In all cases of uncertainty the tenant is most favored by law, because the landlord, having the power of providing expressly in his own favor, has neglected to do so; and also upon the general principle that every man's grant is to be taken most strongly against himself. *Marks v. Gorla Bros.*, 491.

The term provided for in the lease, as set out in headnote 4, is for one year, and after that, "from year to year for the additional term of eight years," subject to a provision in the lease itself by which the lessors give the lessees the option to decide, in effect, whether the term shall be for one year only or for a second term of one year, or a third like term, or a fourth, or fifth, or sixth, or seventh, or eighth, or ninth like term. That is to say, the lease is for successive periods of one year each with the option to the lessees to continue for the respective periods. *Marks v. Gorla Bros.*, 491.

Ejectment.—In an action of ejectment by a landlord against his tenant where the amount of the rent exceeded the value of all the personal property on the premises, the failure of an

LANDLORD AND TENANT—Continued.**Ejectment—Continued.**

instruction to refer to the remedy by distress is immaterial.
Matoaka Coal v. Clinch Valley Min., 522.

Entry by Tenant.—The relationship of landlord and tenant does not exist unless and until the tenant enters into possession. Where a term or successive terms of fixed duration is or are demised by a lease, each term ends at a time certain, to-wit, the end of the time fixed by the lease for the duration thereof. Until or unless the tenant enters or holds over possession into one of such terms, the relationship of landlord and tenant as to such term never commences to exist. If he has entered into possession for a preceding term under the lease, and vacates the premises at or before the end of that term, the relationship of landlord and tenant ceases at the end of such term, without any notice, either from landlord or tenant, being needed to terminate it, unless the parties contract for a notice to be given. *Marks v. Gorla Bros.*, 491.

Frauds, Statute of.—Where a tenant enters under a lease void under the statute of frauds because not under seal and for a longer term than five years (section 2413, Code of 1904), the tenancy is one from year to year. But in the instant case, where the lease was for succeeding terms of one year each, renewable at the option of the lessee, this rule does not apply. *Marks v. Gorla Bros.*, 491.

Holding Over.—See *infra*, "Tenancy from Year to Year."

Joint Tenants and Tenants in Common.—See **JOINT TENANTS AND TENANTS IN COMMON.**

Lease.—See *infra*, "Construction of Lease."

Lease for Successive Terms.—See *infra*, "Entry by Tenant."

A lease for successive years provided that it should continue until the tenant should give a notice to terminate prior to any yearly period therein mentioned. Held: That upon notice by the tenant being given prior to the yearly period mentioned in the lease, the tenancy, which was before that for a definite term of one year, unless another year was added thereto at the option of the lessee, was not succeeded by another term for one year, but ended at the termination of the yearly period in which such notice was given. In effect, the provision is that the notice shall be sufficient if given at any time, so that it be prior to the beginning of the yearly period mentioned therein. *Marks v. Gorla Bros.*, 491.

Where a lease demises successive terms to be held at the option of the tenant, and the tenant holds over possession

LANDLORD AND TENANT—Continued.**Lease for Successive Terms—Continued.**

from one term into another, his succeeding possession is held under the lease, for the succeeding term demised by the lease; and if that term is for a time certain, to-wit, for one year, as in the instant case, it is an estate for years, and will end at the end of such year without notice from or to him to quit, unless the lease or contract itself provides for such notice to be given. If the lease or contract provides for a notice to be given, what notice must be given, and when, depends alone upon such contract provision on the subject. *Marks v. Gorla Bros.*, 491.

Where a lease for successive terms of one year provides for its termination by a notice to the landlord prior to any yearly period, notice for a reasonable time is not necessary. Had the lease not provided when such notice might be given, but merely required a notice, a notice for a reasonable length of time before the beginning of the succeeding yearly term would have been necessary. But the provision in the instant case is, in effect, that the notice shall be sufficient if given at any time, so that it be prior to the beginning of a yearly period. *Marks v. Gorla Bros.*, 491.

Mines and Minerals.—See MINES AND MINERALS.**Notice to Quit.—See *infra*, "Lease for Successive Terms;" Tenancy from Year to Year."**

The relationship of landlord and tenant does not exist unless and until the tenant enters into possession. Where a term or successive terms of fixed duration is or are demised by a lease, each term ends at a time certain, to-wit, the end of the time fixed by the lease for the duration thereof. Until or unless the tenant enters or holds over possession into one of such terms, the relationship of landlord and tenant as to such term never commences to exist. If he has entered into possession for a preceding term under the lease, and vacates the premises at or before the end of that term, the relationship of landlord and tenant ceases at the end of such term, without any notice, either from landlord or tenant, being needed to terminate it, unless the parties contract for a notice to be given. *Marks v. Gorla Bros.*, 491.

Tenancy from Year to Year.—*Holding Over*.—If a tenant should hold over possession of premises from one term demised by a lease into another not demised by the lease, or if demised, is so demised that the duration of such succeeding term is left uncertain by the lease, in this, that both the landlord and tenant have an option of terminating it at the end of any year, upon notice, not provided for by the lease but by law,

LANDLORD AND TENANT—Continued.

Tenancy from Year to Year—Continued.

that would create in the tenant holding over a tenancy from year to year. *Marks v. Gorla Bros.*, 491.

Notice to Quit.—By statute (section 2785, Code of 1904), in case of a tenancy from year to year, notice of intention to terminate the tenancy is required, but other tenancies are left to be governed in this regard by the lease or contract between the parties, and notice to quit is either required or not required as may be provided for or not provided for in the agreement between the parties. *Marks v. Gorla Bros.*, 491.

Statute of Frauds.—Where a tenant enters under a lease void under the statute of frauds because not under seal and for a longer term than five years (section 2413, Code of 1904), the tenancy is one from year to year. But in the instant case, where the lease was for succeeding terms of one year each, renewable at the option of the lessee, this rule does not apply. *Marks v. Gorla Bros.*, 491.

Termination Upon Notice at Option of Either Landlord or Tenant.—A lease not under seal demised the premises for a term of one year, "at a certain monthly rental for and during the term of this lease as hereinafter expressed." The lease further provided that: "It is distinctly understood and agreed between the parties hereto that the lessee shall have the option of leasing the said premises from year to year for the additional term of eight years, upon the terms, stipulations, provisions and requirements above enumerated." Before the expiration of the first term of one year, an assignment of the lease was made to the defendants and they entered into possession of the premises thereunder. Before the expiration of the said one year term the defendants gave the original lessor notice under the lease "that they would accept the optional right therein provided for and continue in possession of the building." Accordingly, the defendants held over beyond the one year term into the second year. During the second year an addendum, not under seal, was added to the lease, by which it was agreed that the defendants should have the right of renting the premises from year to year, as provided for in the lease, and that the option of leasing the same from year to year should be construed to mean that the rent from year to year should continue until the defendants should give notice to terminate the lease prior to any yearly period therein mentioned. Held: That as the lease in the instant case did not leave the option to terminate on notice with both landlord and tenant, but

LANDLORD AND TENANT—Continued.**Tenancy from Year to Year—Continued.**

only with the tenant, it did not create a tenancy from year to year. *Marks v. Gorla Bros.*, 491.

At common law it was an inseparable and invariable incident of a tenancy from year to year, that it could be terminated at the end of any yearly period, either by the landlord or tenant, by giving six months prior notice of the purpose to so terminate the tenancy. By statute (section 2785, Code of 1904), it is provided that "A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year, for three months if it be for land within * * * (a) city or town, of his intention to terminate the same." In the case of a tenancy from year to year, therefore, formerly at common law and now by statute, both the landlord and tenant had and have the option to terminate the tenancy at the end of any yearly period by giving notice as aforesaid. *Marks v. Gorla Bros.*, 491.

A tenancy from year to year may be created by the express terms of a lease or contract, as well as by implication of law from the holding over of the premises by a tenant with the assent of the landlord, after the expiration of a definite term of a former tenancy; but when created by the express terms of a lease or contract the distinguishing characteristic that it may be terminated by either party upon due notice to the other, is never absent. *Marks v. Gorla Bros.*, 491.

LAST CLEAR CHANCE.

Application of Doctrine.—Plaintiff's decedent, a licensee, met his death by being run down by an engine of defendant's, while walking on the track of defendant. The track was straight for several hundred yards at the place where the accident happened, it occurred in the daytime, and there was nothing to have prevented those in charge of the train from discovering plaintiff's intestate on the track, or the latter from seeing the approaching train, had each observed the duty of watchful vigilance. It was a cold, blustering day, and plaintiff's intestate, who was an old man, was walking slowly against the wind, which was blowing his clothing backward from his person as he proceeded on his way, leaning forward, the better to face the wind. Held: That under the evidence the jury would have been warranted in finding that the engineer in charge of the defendant's train, by keeping a reasonable lookout, inevitably must have discov-

LAST CLEAR CHANCE—Continued.**Application of Doctrine—Continued.**

ered plaintiff's intestate on the track in time to have averted the accident; and, moreover, they might have found the existence of sufficient superadded facts and circumstances "to put a reasonable man upon his guard that the person upon the track pays no heed to his danger and will take no step to secure his own safety." *Kabler's Adm'r v. Southern Ry. Co.*, 90.

Crossings.—In an action for damages for injury to an automobile of plaintiff, by an express electric train of defendant, at a public road crossing, it appeared that when the train was about 1000 feet away from the crossing the motorman saw the plaintiff's automobile stop upon the track and could easily have stopped before reaching the crossing. There were superadded facts, plainly observable by the motorman, showing that the plaintiff was preoccupied and unconscious of his imminent peril. Held: That a verdict of the jury in favor of plaintiff must be sustained under the well-settled doctrine of the last clear chance. *Norfolk Sou. R. Co. v. Whitehead*, 139.

In an action for injuries to plaintiff's automobile by the train of defendant at a public crossing, where the doctrine of the last clear chance was applicable, a number of other questions were raised with respect to the negligence of defendant and the contributory negligence of the plaintiff in certain particulars. Held: That if both defendant and plaintiff were negligent in such matters respectively, it was manifest that none of them were the proximate cause of the injury, since the doctrine of the last clear chance was applicable. *Norfolk Sou. R. Co. v. Whitehead*, 139.

Harmless Error.—In an action for injuries to an automobile by defendant's train at a public crossing, the court instructed the jury that if they believed from the evidence that the plaintiff was guilty of contributory negligence, yet if they believed that the "defendant company knew of the plaintiff's danger, or by the exercise of ordinary care should have known of plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so." It was objected to this instruction that it imposed an absolute and unqualified duty upon the defendant to stop its train, and that it should have been qualified by the insertion of the words "by the exercise of ordinary care," or words of similar import, after the words "avoided the accident." Held: That as a legal proposition this position is correct, and the instruction should have been qualified as suggested. But

LAST CLEAR CHANCE—Continued.**Harmless Error—Continued.**

upon the facts of the case it plainly appeared that this error was not prejudicial to the defendant, since with the train about 1000 feet away from the crossing when the motorman saw the plaintiff's automobile stop upon the track, the jury must have found that by the exercise of ordinary care the defendant could have stopped its train in time to have avoided the accident. *Norfolk Sou. R. Co. v. Whitehead*, 139.

"LAW OF THE CASE."

Closely akin to the doctrine of *res judicata* is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own, though it is at times confused with one or the other of the other two. *Steinman v. Clinchfield Coal Corp.*, 611.

Adjudication to Questions Involved.—The doctrine of the "law of the case," as stated in the preceding syllabus, applies where the question raised on the second appeal was necessarily involved in the first appeal, whether actually adjudicated or not. *Steinman v. Clinchfield Coal Corp.*, 611.

Court of Foreign Jurisdiction.—The doctrine of the "law of the case" does not apply to a former decision, in unended litigation, by a court of a foreign jurisdiction. Consequently, a judgment of the United States Circuit Court of Appeals remanding the case for a new trial is not, where plaintiff took a nonsuit and brought his action for the same cause in the State court, the law of the case in the latter action. *Steinman v. Clinchfield Coal Corp.*, 611.

Different Facts.—The doctrine of the "law of the case" can only be invoked where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts. *Steinman v. Clinchfield Coal Corp.*, 611.

Different Parties.—If the parties are different, though the question be the same, the case is controlled by the rule *stare decisis*, and the doctrine of "the law of the case" has no application. *Steinman v. Clinchfield Coal Corp.*, 611.

"LAW OF THE CASE—Continued.

Final Judgments.—Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final. *Steinman v. Clinchfield Coal Corp.*, 611.

Jurisdiction of Court in First Case.—Sometimes even between the same parties and relating to the construction of the same instrument, the first judgment is neither *res judicata*, nor the "law of the case." It must appear not only that the question was the same in both cases, but that the court in the first suit had power and jurisdiction to determine the question. *Steinman v. Clinchfield Coal Corp.*, 611.

Res Judicata and Stare Decisis.—Closely akin to the doctrine of "*res judicata*" is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own, though it is at times confused with one or the other of the two. *Steinman v. Clinchfield Coal Corp.*, 611.

Statement of the Doctrine.—Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final. *Steinman v. Clinchfield Coal Corp.*, 611.

Subsequent Litigation between Other Parties.—The doctrine of the "law of the case" presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases as a precedent. *Steinman v. Clinchfield Coal Corp.*, 611.

LEASE. See LANDLORD AND TENANT; MINES AND MINERALS.

LEGAL CONCLUSIONS.

Indictment and Information.—Ordinarily, the acts done should be charged, in order to give the defendant the necessary information. It is the function of an indictment to charge facts and not legal conclusions. *Pine v. Commonwealth*, 812.

LIBEL AND SLANDER.

Cross-Examination.—See *infra*, "Damages."

Damages.—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, i. e., within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

If defendants, in an action for libel, are not content to let the case stand upon the general damages presumed by law, but wish to rebut this presumption by questioning plaintiff on cross-examination as to what actual injury plaintiff had in fact sustained by the libel, they have the right to do so, in diminution of damages. But having asked the question, they cannot object to an answer in direct response to the question. *Henry Myers & Co. v. Lewis*, 50.

In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where a libel is actionable *per se*, plaintiff is entitled to recover substantial, and even punitive damages, without any proof of particular instances of special damage. The law presumes general damages where the libel is actionable *per se*. *Henry Myers & Co. v. Lewis*, 50.

LIBEL AND SLANDER—Continued.**Damages—Continued.**

When an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Exemplary Damages.—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

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Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Partnership.—*Liability of Partnership for Libel Published by One of the Partners.*—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

Witness, Cross-Examination of.—See *infra*, "Damages."

LICENSE, REAL PROPERTY.

Railroads.—See **RAILROADS.**

LIENS. See **MECHANICS' LIENS; VENDOR AND PURCHASER.**

Ascertainment of Liens.—See **JUDICIAL SALES.**

Assignment by General Contractor.—See **ASSIGNMENTS.**

Suretyship.—See **SURETYSHIP.**

Vendor and Purchaser.—See **VENDOR AND PURCHASER.**

LIMITATION OF ACTIONS. See **ADVERSE POSSESSION; LACHES.**

Judgments and Decrees.—A valid return may be made after the day to which the execution is returnable. In the case at bar, the executions were returned "no effects" two days after the return day. This was clearly within a reasonable time, and, therefore, the returns were made in the lawful performance of a delayed duty. Such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions. *Moorman v. Campbell County*, 112.

Mills and Milldams.—Flooding lands where dam is erected under milling acts. *Norfolk & W. R. Co. v. Hayden*, 118.

Water and Watercourses.—The milling acts of February, 1745 (5 Hen. Stat. 360), the act in force when the dam in the instant case was built, provided no forfeiture penalty in case the mill was rendered unfit for use and not rebuilt within a certain time. There is, therefore, nothing in that act to take the case out of the operation of the statute of limitations, as stated in the first syllabus. *Norfolk & W. R. Co. v. Hayden*, 118.

The preponderance of evidence in the instant case fails to show that the dam in question was established under any of the milling acts. Hence, the plaintiff has failed to establish his right to rely upon such acts, or any of them, to take the case out of the operation of the statute of limitations. *Norfolk & W. R. Co. v. Hayden*, 118.

Where the injury complained of arose from the flooding of complainant's lands by reason of defendant's dam—a permanent structure—the cause of action for such injury arose at the time of the first commencement of the injury following the original erection of the dam and the right of action for all such injury, past, present and future was barred by the statute of limitations after the expiration of five years thereafter, unless there is something to take the case out of the general rule on the subject. *Norfolk & W. R. Co. v. Hayden*, 118.

LIS PENDENS.

Code of 1904, Section 3566, Requiring the Docketing of a Lis Pendens.—Code of 1904, section 3566, requiring the docketing of a *lis pendens*, in order to affect a purchaser for value and

LIS PENDENS—Continued.**Code of 1904, Section 3566, Requiring the Docketing of a Lis Pendens—Continued.**

without actual notice, applies only to a purchaser of real estate in a pending suit, not to a purchaser after the suit has been terminated by a judgment or decree, nor to a purchaser of personal property. Prior to the enactment of this statute, any suit at law or in equity which concerned the title to real estate was notice to all the world of the title of the respective parties to the suit, and whoever bought of either party pending the suit was charged with notice of title set up by the other, and was bound by any judgment or decree affecting that title which was rendered in the suit. The rule is the same now as to personal property, but it has been changed as to real estate so as to require the docketing of a *lis pendens* in order to affect a purchaser for value and without actual notice. The change wrought by the statute applied only to a purchaser of real estate in a pending suit. It was not extended to a purchaser of personal property, nor to the effect of a judgment or decree after the termination of a suit. *Steinman v. Clinchfield Coal Corp.*, 611.

Purchaser for Value and without Notice.—See *infra*, "Code of 1904, Section 3566, Requiring the Docketing of a Lis Pendens."

LOGS. See TREES AND TIMBER.

LOST INSTRUMENTS AND RECORDS.

Best and Secondary Evidence.—A copy of an original contract, which has been lost, made by counsel and filed with the bill of one of the parties to the contract, which bill alleged that the original had been filed with the answer of the party in another suit, although not authenticated by the certificate of the clerk of the court among the records of which the original was filed at the time such copy was made, is admissible in evidence. The fact that at the time such copy was filed it was not the best evidence and valid objection might have been made in that suit to its introduction in evidence, is immaterial, after the original has been lost, and section 3834, Code of 1904, has no application. *Baber v. Baber*, 740.

Bill in Equity to Set up Lost Deed.—A bill attempting to set up a lost deed alleged that all the parties who were connected with, and who knew anything about, the transaction, were dead, and that complainants were unable to prove that the deed was in fact made. Held: That the court could not entertain a case, which, in the outset, the complainants ad-

LOST INSTRUMENTS AND RECORDS—Continued.**Bill in Equity to Set up Lost Deed—Continued.**

mitted they would be unable to support by proof when the burden of proof was upon them to do so. *Matney v. Yates*, 506.

Jurisdiction of Equity.—Whether equity has inherent jurisdiction to set up a lost instrument or not, it clearly has jurisdiction to enforce a judgment lien, and having acquired jurisdiction on this ground, it can retain the case so as to do complete justice between the parties, setting up a lost deed if necessary for this purpose; and this, although the suit does not conform to the statutory requirements for setting up lost instruments. *Steinman v. Clinchfield Coal Corp.*, 611.

Parol Evidence.—Where the proof of the former existence of an instrument is strong and conclusive, even parol evidence of its contents is admissible, and if strong and convincing, will set up and establish the lost instrument. *Baber v. Baber*, 740.

MANDAMUS.

Summons and Process.—The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary. *Moorman v. Campbell County*, 112.

MANDATORY STATUTE. See **STATUTES.**

MAP. See **STREETS AND HIGHWAYS.**

MARKETABLE TITLE. See **VENDOR AND PURCHASER.**

MARRIAGE SETTLEMENTS.

Curator.—There is not necessarily any incompatibility in the office of trustee under an antenuptial settlement and that of curator of the estate of the deceased husband, pending the determination of the validity of the antenuptial settlement. *Gooch v. Suhor*, 35.

Equity.—Jurisdiction of Equity over Controversies Touching Marriage Settlements. *Gooch v. Suhor*, 35.

Jurisdiction.—Where the court was not exerting its general equity jurisdiction, but merely discharging the limited functions of a probate court in the matter of appointing an administrator or curator for an estate, it was plainly right in

MARRIAGE SETTLEMENTS—Continued.**Jurisdiction—Continued.**

refusing to take cognizance of a dispute over the validity of an antenuptial agreement. *Gooch v. Suhor*, 35.

Where the petition of plaintiff in error to be permitted to qualify as administratrix, and attacking the validity of her antenuptial settlement, neither made parties nor prayed that those representing adverse interests to the petitioner might be convened, and no process was awarded or issue joined thereon, and concluded with the request that if the court should be of opinion that it was without jurisdiction to pass upon the validity of the antenuptial agreement in the probate case, it would appoint her nominee curator of the estate pending proceedings by her to determine the validity of the contract, the state of the pleadings was prohibitive against the assumption by the court of jurisdiction to determine the validity of the antenuptial settlement. The petition was not a pleading either in form or substance, but a mere motion in writing or application to the court that plaintiff in error, or her nominees, be allowed to administer on the estate. *Gooch v. Suhor*, 35.

Jurisdiction of equity over controversies touching marriage settlements. *Gooch v. Suhor*, 35.

MARSHALING ASSETS.

Administration of Estates.—The estate of an intestate was being fully administered by a court of equity. All of the persons interested in the funds were before the court, and there were no other claimants thereof, nor any intervening liens or equities in favor of any other persons. The court directed that the entire interest of an heir and distributee, in the personal as well as in the real estate, should be applied towards the satisfaction of judgments against him, upon which no executions had issued. The continuing right to issue executions upon the judgments was clear. It was argued that this was error, because, there being no valid execution outstanding, there was no specific lien upon the distributee's interest in the personal estate. Held: That the action of the court might be justified upon two grounds: First, that the court having acquired jurisdiction could retain it and do complete justice between the parties; and secondly, that as it appeared that the attorneys of the distributee and heir had a lien for their fees upon his entire interest, both real and personal, and the lien of the judgments being only upon the real property, the court, if necessary, would have marshalled the assets and applied the fund arising from the personal estate, first, towards the satisfac-

MARSHALING ASSETS—Continued.**Administration of Estates—Continued.**

tion of the lien of the attorneys for their fees so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments. *Moorman v. Campbell County*, 112.

MASTER AND SERVANT.

Actions.—See *infra*, "Declaration."

Animals.—Liability of master for vicious animals. See *infra*, "Assumption of Risk;" "Safe Machinery and Appliances."

Assumption of Risk.—See *infra*, "Non-Assignable Duty."

In an action by a servant against his master for injuries inflicted upon him from being kicked by a mule, the property of the master, the court instructed the jury that the servant did not assume the risk of injury by a vicious mule, about which he had to work, but of the vicious and dangerous character of which he did not know and could not have found out by the exercise of ordinary care, and of which he was not warned by defendant or its employees, who knew or ought to have known thereof. The incorporation of the words "or its employees" in this instruction, if error, was harmless error, so far as defendant was concerned. If the plaintiff had knowledge, no matter how that knowledge was obtained, of the vicious and dangerous nature of the mule, such knowledge would defeat his right to recover; because if he knew the vicious and dangerous propensities of the animal, he would be held to have assumed the risk. Therefore, an instruction, the tendency of which was to increase the plaintiff's sources of knowledge must enure to his prejudice and to the benefit of the defendant, and such was the effect of the superadded words "or its employees." *Turner v. Richmond & R. R. Co.*, 194.

The doctrine of assumption of risk applies to changing conditions at the place of work of the servant due to the progress of his work, or to the other operations of the master within view of the servant, but does not apply to other operations of the master than those being performed by the servant, from which the view by the latter of, and the view of him from, such operations was obstructed, and which operations, if properly performed, need not have changed the condition or increased the danger of the place of work. In the latter case the master owes the duty of prevision with respect to what is likely to subsequently occur affecting the safety of the place of work. *Clinchfield Coal Corp. v. Ray*, 318.

The servant assumes the risk of dangers which are known to and appreciated by him, or which are ordinarily incident

MASTER AND SERVANT—Continued.**Assumption of Risk—Continued.**

to the service, or are open and obvious, which the law will infer are so known to him. *Clinchfield Coal Corp. v. Ray*, 318.

Where a servant, a track repairer, was given work by the assistant foreman in charge of a mine, repairing the track between stationary cars left on the track in a mine, it is a non-assignable duty of the master to exercise ordinary care under the circumstances to prevent the moving trips of other cars coming into collision with the cars, left and expected to remain stationary, so as to drive or push them back upon and increase the danger of the plaintiff's place of work. The defendant having failed to place any signal or to otherwise exercise reasonable care to notify its other servants operating the motor and cars with a view to prevent such a collision and result as aforesaid, the subsequent action of such servants resulting in such collision and injury to the servant was but the natural and probable result of such negligence of the defendant. The proximate cause of the injury in such a case was the failure of the master to place any signal or to otherwise exercise reasonable care to notify its servants operating its motor and cars, and hence the master is liable in damages for the injurious result to the servant. *Clinchfield Coal Corp. v. Ray*, 318.

Whether or not a servant knew or ought to have known of the dangerous condition of his place of work and hence assumed the risk thereof is a question for the jury, when the danger is not so open and obvious and not so apparent as to charge him with knowledge thereof as a matter of law. *Turner v. Richmond & R. R. Co.*, 194.

Automobiles.—See **AUTOMOBILES**.

Character of Service.—See *infra*, "Non-Assignable Duty."

Conclusiveness of Verdict.—In an action against a master by his servant, a track repairer, for injuries sustained while working in a mine, the verdict of the jury is conclusive on such questions as the contributory negligence of the plaintiff and that the defendant could not have reasonably anticipated a collision resulting in injury to the plaintiff, when the questions were submitted to the jury upon full and fair instructions. *Clinchfield Coal Corp. v. Ray*, 318.

Contributory Negligence.—See *infra*, "Obedience to Orders."

In an action for the death of a servant by the negligence of his master, the burden of proving contributory negligence rested upon the defendant, unless the fact of such contributory negligence appeared from the plaintiff's own evidence. *Virginia Iron, etc., Co. v. Prophet*, 685.

MASTER AND SERVANT—Continued.**Contributory Negligence—Continued.**

It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernable by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. *Lynchburg Foundry Co. v. Dalton*, 480.

Plaintiff was employed by the defendant foundry company, when not engaged in the shop, to load all kind of pipe upon cars. Pipe were loaded by means of an engine, with a boom or crane. Extending out, and attached thereto, was a block, and to the end of the block was fastened a hook. Separate and apart from the boom was a ring to which two chains were permanently fastened. To the other end of each chain was fastened a large hook. On the morning of the injury plaintiff was engaged as "ground" man in loading a "special" pipe, for which only one chain was needed and he had been instructed to hang the unused chain in the ring. This he failed to do, as he found both hooks already hung in the ring, and while plaintiff, in obedience to orders, with both hands on the pipe, was shoving it into the door of the car, as he had been directed by the company to do, the unused chain became detached and fell, striking one of his hands and causing the injury for which the action was brought. Plaintiff knew that if the extra chain was not properly hooked up, and came in contact with the top of the car it would probably be knocked out and the chain would fall. Held: That it was plaintiff's duty to hang up the extra chain and so hang it as not to cause injury to himself. This duty he neglected to perform, and his resulting injury is to be attributed to his own negligence and not to the negligence of his master. *Lynchburg Foundry Co. v. Dalton* 480.

Declaration.—A declaration which alleged wrongful and unjustifiable interference by the defendant with the contractual relation existing between plaintiff and a railroad company, his employer, whereby the seniority rights acquired by plaintiff as an incident to his employment were seriously affected, the result of which was the taking from the plaintiff of regular runs and better pay, and the reduction of his regular monthly pay as brakeman and flagman from \$100.00 to \$20.00, states a good cause of action and measures up to the required standard under the procedure in this State. *Brotherhood of R. T. v. Vickers*, 311.

MASTER AND SERVANT—Continued.

Duration of Contract of Hiring.—See *infra*, "Holding Over."

Duty of Master to Warn Servant.—The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment. *Lynchburg Foundry Co. v. Dalton*, 480.

Where the alleged cause of danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, the question of whether he should have been warned is one of law for the court. *Lynchburg Foundry Co. v. Dalton*, 480.

Plaintiff was injured while attempting, with a small stick, to put tar upon the wheels operating a part of the machinery of defendant's sawmill. He was a competent and intelligent man, who had worked for the defendant about three years in and around the plant. The dangerous character of the machinery itself was perfectly open and obvious to any man of ordinary intelligence, and there was no duty upon the defendant to warn plaintiff of its dangerous character. Moreover, plaintiff had been assigned to oil the machinery for a few days and there was no evidence that he had been directed to use any tar anywhere, and there was no reason for his master to expect that he would use it. He voluntarily and gratuitously undertook something which he was not ordered or expected to do, and has no legal cause of complaint. *Wadkins v. Damascus Lumber Co.*, 691.

Electric Wires.—See *infra*, "Mines and Minerals."

Estoppel.—The acceptance by a servant of payments made him by his master, accompanied by the statements of account contained in remittance statements, does not estop him from drawing a larger salary per month than that shown to be due him by the remittance statements, unless the master was misled thereby to its prejudice, in that it was thus led to continue the employment of plaintiff beyond the term it was legally bound to continue it. *Norfolk Hosiery Co. v. Westheimer*, 130.

Fellow Servants.—See FELLOW SERVANTS.

Holding Over.—In case of a contract of employment by the year, to be performed within the year, arising from a holding over and a continuance of a preceding employment by the year, without any notice either from employer to employee, or from the latter to the former, before the beginning of the new employment, of any proposed change in the terms of the preceding employment, the new contract of employment

MASTER AND SERVANT—Continued.**Holding Over—Continued.**

is implied in law to be on the same terms as the preceding employment. *Norfolk Hosiery Co. v. Westheimer*, 130.

In such a case, the servant having furnished a valuable consideration to bind such new contract of employment by entering upon the performance thereof, the master could not thereafter change any of the terms without the assent of the servant, that is, without a meeting of the minds of the servant and master on a different contract. *Norfolk Hosiery Co. v. Westheimer*, 130.

Instructions.—See *infra*, "Assumption of Risk."

In an action for the death of a servant from contact with an electric wire, an instruction that it was the duty of the master to use care commensurate with the danger to inspect and maintain its wire is not erroneous, although there was no allegation in the declaration charging failure to inspect. The declaration charged that it was the duty of the company to use reasonable care to maintain the wire in a safe position, and the breach of that duty. The duty to inspect was a minor incident to the principal duty of properly maintaining the wire, and did not call for special averment. *Virginia Iron, etc., Co. v. Prophet*, 685.

In an action for the death of a servant through the negligence of his master, an instruction which did not conclude with a direction to find for the plaintiff, but merely told the jury that the omission of the master to use ordinary care to make a fallen wire reasonably safe, after it knew, or by ordinary care might have known, of the defect, was negligence, states a correct proposition of law. *Virginia Iron, etc., Co. v. Prophet*, 685.

Interference with Contract Relation.—See *infra*, "Declaration."

Liability of Master for Torts of Servant.—Mere ratification is not itself a test of liability of one for the tortious act of another, much less is the receipt of a benefit from the tortious act such test, which, in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification is material as bearing upon the measure of damages, but is not a true test of original liability. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment? *Henry Myers & Co. v. Lewis*, 50.

Where there is neither express authority in advance nor ratification afterwards, the test of the liability of the master or principal for the tortious act of the servant or agent, is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary

MASTER AND SERVANT—Continued.**Liability of Master for Torts of Servant—Continued.**

course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a nontortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the *tortious manner* in which a transaction is conducted or a service is performed by his servant or agent, entrusted by the former to the latter to be conducted or performed for him in a nontortious manner. The same is true, of course, with respect to the liability of a partnership for a tort of an individual partner. *Henry Myers & Co. v. Lewis*, 50.

Liability of Master to Servant for Personal Injuries.—See *infra*, "Assumption of Risk;" "Instructions;" "Safe Machinery and Appliances."

In an action by a servant against his master for personal injuries due to a wheel which he was operating "getting away" from him and striking his body, the evidence tended to show that one of the cogs of the wheel was broken out and other cogs nicked and damaged; and this condition caused the wheel to slip and break away from the control of the plaintiff. Held: That the question as to the cause of the accident and the manner of its occurrence having been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence. *The Ferries Co. v. Brown*, 13.

Mines and Minerals.—A mining company is guilty of actionable negligence in suffering an electric wire to remain detached from its original fastenings, which held it in a safe position, and in permitting it to sag to such an extent as to become dangerous to its employees, where if the company had used ordinary care to inspect the mine, the dangerous condition of the wire would have been discovered, and where the attention of the "mine boss" in charge of the entry, where the wire was strung, had been specifically drawn to the situation. In the case at bar, it was the duty of the company to have warned plaintiff's intestate, its employee, of the unusual and extraordinary danger to which he was exposed by the sagging wire, and its negligence was the efficient and proximate cause of his death. *Virginia Iron, etc., Co. v. Prophet*, 685.

Non-Assignable Duty.—In the instant case it was urged that there was a distinction with respect to the application of the doc-

MASTER AND SERVANT—Continued.**Non-Assignable Duty—Continued.**

trine of assumption of risks to overhaulers and track repairers, but it is not from the difference in the character of the service that the non-assignable duty of the master to exercise ordinary care under the circumstances to prevent injury to the servant arises, but from the situation and surrounding circumstances in which the servant is placed and the knowledge, actual or constructive, of these factors in the case being brought home to the master. *Clinchfield Coal Corp. v. Ray*, 318.

Obedience to Orders.—The primary duty of the servant is obedience to the orders of the master, and if, when in discharge of that duty, he is injured in consequence of such obedience, he may recover of the master unless the danger is so manifest that a reasonably prudent man would not have encountered it. But obedience to the master's orders will not excuse the servant's negligence in the execution of the orders. *Lynchburg Foundry Co. v. Dalton*, 480.

Presumptions and Burden of Proof.—*Contributory Negligence.*—*Virginia Iron, etc., Co. v. Prophet*, 685.

Question of Law and Fact.—The question as to the cause of the accident and the manner of its occurrence having been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence. *The Ferries Co. v. Brown*, 13.

Where the alleged cause of danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, the question of whether he should have been warned is one of law for the court. *Lynchburg Foundry Co. v. Dalton*, 480.

Whether or not a servant knew or ought to have known of the dangerous condition of his place of work and hence assumed the risk thereof is a question for the jury, when the danger is not so open and obvious and not so apparent as to charge him with knowledge thereof as a matter of law. *Turner v. Richmond & R. R. Co.*, 194.

Receipt in Full.—Where a servant had endorsed and used a check of his master, containing the entry on its face "in full to July 1, 1915," this constitutes *prima facie* evidence that such payment was in full of the servant's salary to July 1, 1915. But it was *prima facie* evidence only of such fact. The servant was at liberty, notwithstanding his acceptance and use of such check, to prove the correct status of the account between him and his master. The acceptance and

MASTER AND SERVANT—Continued.**Receipt in Full—Continued.**

use of such check merely placed the burden of proof upon the servant. *Norfolk Hosiery Co. v. Westheimer*, 130.

Release.—Plaintiff, a servant of defendant's, had executed an instrument releasing defendant from liability for injuries sustained by plaintiff while in the employment of defendant. In an action by plaintiff against defendant for personal injuries, defendant requested the following instruction: "The jury are instructed that if they believe from the evidence that the plaintiff executed the release exhibited, they must find for the defendant." There was no error in refusing this instruction. The plaintiff was attacking the release referred to upon the ground that it was without consideration, and that it had been procured by fraud. There was evidence tending to support this attack in both aspects, and the instruction ignored both and directed a verdict for the defendant. *The Ferries Co. v. Brown*, 13.

Rules for Conduct of Business.—Where machinery is of a very simple character and the manner of its use open and obvious to the most casual observer, there is no need for the master to publish general rules for the government of the business. *Lynchburg Foundry Co. v. Dalton*, 480.

Safe Machinery and Appliances.—Absolutely safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. *Wadkins v. Damascus Lumber Co.*, 691.

It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith to do his work, and where the master knows or should know that an animal furnished for the use of the servant is vicious, he is liable for injuries to his servant caused thereby, subject, of course, to the qualification that the vicious and dangerous propensities of the animal are unknown to the servant, and that he is not guilty of contributory negligence. *Turner v. Richmond & R. R. Co.*, 194.

Safe Place to Work.—Plaintiff, an employee of defendant, was injured by having his hand caught and pulled into the cogs and gearing of two wheels which operated a part of the machinery of the defendant's sawmill. At the time of his injury he was attempting, with a small stick, to put some tar upon the wheels. The place where he was standing was as safe as any other place would have been with the same sort of machinery in operation around it. The construction

MASTER AND SERVANT—Continued.**Safe Place to Work—Continued.**

of the defendant's plant and the installation of its machinery conformed to that of similar plants in general use in the country. As the machinery and not the place where he worked constituted the danger and caused the injury to plaintiff, an allegation that defendant had not exercised ordinary care to furnish the plaintiff a reasonably safe place in which to work was not sustained by the evidence. *Wadkins v. Damascus Lumber Co.*, 691.

Vice Principal.—See FELLOW SERVANTS.

Volunteer.—A track repairer was set to work repairing track in a mine. A miner having loaded a car with coal pushed it out on the track at the place where the track repairer was at work, but owing to a defect in the track the car was derailed. Thereupon the track repairer undertook to put it back upon the track so as to remove it and proceed with his work. While so engaged his leg was caught between this car and an empty car, with which a return trip of cars had collided, jarring the empty car violently back and catching the track repairer between it and the derailed car. Held: That the track repairer was not a volunteer in the work in his effort to replace on the track the derailed car. *Clinchfield Coal Corp. v. Ray*, 818.

Wages of Servant.—See *infra*, "Estoppel," "Receipt."

MASTER IN CHANCERY.

Report.—There is a strong presumption in the appellate court in favor of a decree by which the trial court has confirmed the report of a commissioner upon a question of fact. *Maddux v. Buchanan*, 102.

A commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable. *Alexander v. Critcher*, 723.

MAXIMS.

Equity looks to the substance of things and not to mere form. An equity court will always consider the substance and not the form. This doctrine is a wholesome one and is favored by courts of equity, but always for the purpose of promoting substantial justice, never for the purpose of perpetrating a wrong in the name of equity. *Snead v. Atkinson*, 182.

Expressio Unius.—See CONSTITUTIONAL LAW.

MECHANICS' LIENS.

Account between General Contractor and Owner.—Included in the sum found by a commissioner as the balance due from a general contractor to the owner was an item for liquidated damages, which the subcontractors contended was an error in the record. Held: That the question was not material so far as the subcontractors were concerned, where with that item eliminated there was still nothing due from the owner to the general contractor upon which their claims could attach. *Maddux v. Buchanan*, 102.

Architect's Certificate.—In mechanic lien proceedings the certificate of the architect, showing that no indebtedness existed from the owner to the general contractor, made in compliance with one of the provisions of the building contract, in the absence of either allegation or proof or bad faith on his part, must be accepted as conclusive. *Maddux v. Buchanan*, 102.

Assignment by General Contractor.—Section 2482-a, Code of 1904, completely protects the owner of the building, and the case at bar fully illustrates its effectiveness as a remedy for every interested party. All that the owner has to do in case such an assignment is made is to follow the example of the owner in the instant case—pay the money into court and convene the claimants of the fund, and relieve himself of all responsibility in connection therewith. If he does not know the claimants of the fund, then he can take advantage of the statute (section 3230 of the Code of 1904) which authorizes complainants who think that there may be persons who are interested in the subject whose names are unknown, to make them parties to the suit by the general description of "parties unknown," and on proper affidavit to have them convened by order of publication. *London Bros. v. National Exchange Bank*, 460.

Section 2482-a, Code of 1904, provides that no assignment or transfer of any debt due or to become due to a general contractor by the owner for the construction or repairing of any structure for such owner, shall be valid until the claims of all subcontractors, supply men, etc., against such general contractor for labor and materials furnished in and about the construction of such structure shall have been satisfied. Held: That the language of the act was too plain to need construction, and that its benefits could not be confined to subcontractors, material men, etc., who had perfected mechanics' liens, which in the case at bar it was admitted they could not have done because the owner of the building in question was a municipal corporation. *London Bros. v. National Exchange Bank*, 460.

MECHANICS' LIENS—Continued.**Assignment by General Contractor—Continued.**

Section 2482-a, is not only simple and unambiguous in its language, but its purpose is lawful as well as laudable, and is plainly manifest. There is no ambiguity therein, whether considered as a separate and independent statute or in connection with the mechanics' lien statutes. Section 2482-a discourages the assignment by the general contractor of any part of the debt due or to become due him by the owner for the construction of the building, by providing that such assignment shall not be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt, unless and until, the claims of all subcontractors, supply men and laborers against such general contractor for labor performed and material furnished in and about the construction, erection and repairing of such building, shall have been satisfied. *London Bros. v. National Exchange Bank*, 460.

Contract under Which Lien Acquired.—A subcontractor can have no legitimate claim upon the owner, except under and by virtue of the statute. And, while it would not be competent for an owner to defeat the statutory rights of a subcontractor by a stipulation in the general contract against liens, or to assist the general contractor in placing a *bona fide* asset beyond the reach of his creditors by any subterfuge embodied in the terms of the general contract, the settled general rule is that a subcontractor is charged with notice and bound by the terms of the general contract, and this rule applies especially to the mode and terms of payment agreed upon between the owner and the general contractor. *Maddux v. Buchanan*, 102.

There is no statute requiring the recordation of a contract between an owner and a general contractor. *Maddux v. Buchanan*, 102.

Necessity of Compliance with Statute.—The statute was designed to protect subcontractors, and creates a liability which would not otherwise exist, but its terms must be met before its benefits can be enjoyed. In other words, the owner is under no obligation to protect the interest of the subcontractor, except where the latter has complied with the law and thus placed himself in a position to demand protection from the owner. *Maddux v. Buchanan*, 102.

Necessity of Indebtedness to General Contractor.—In mechanic lien proceedings the certificate of the architect, showing that no indebtedness existed from the owner to the general contractor, made in compliance with one of the provisions of

MECHANICS' LIENS—Continued.**Necessity of Indebtedness to General Contractor—Continued.**

the building contract, in the absence of either allegation or proof of bad faith on his part, must be accepted as conclusive. *Maddux v. Buchanan*, 102.

Laborers and material men are favored by the statute, but not to the extent of requiring the owner of property to pay the same bills twice, once to the builder with whom he has contracted, and again to parties with whom he has no contractual relations. The present mechanic's lien laws deal fairly with both the owner and the subcontractor, requiring the owner, after notice, to withhold from the general contractor enough to pay the subcontractor, provided however, "the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given, or may thereafter become indebted by virtue of his contract with said general contractor." *Maddux v. Buchanan*, 102.

Where it appeared from the evidence that there was no time after notice to the defendant of the claim of the subcontractors when he was indebted in any amount to the general contractor, he was under no liability towards the subcontractors. *Maddux v. Buchanan*, 102.

Owner's Liability.—See *infra*, "Necessity of Indebtedness to General Contractor."

Recording Contract.—See *infra*, "Contract under Which Lien Acquired."

Requisites of Lien.—See *infra*, "Necessity of Compliance with Statute."

MENTAL ANGUISH. See DAMAGES.

MERCHANTABLE TIMBER. *McCorkle & Son v. Kincaid*, 546.

MILLS AND MILLDAMS.

Forfeiture under Milling Act.—If the dam in the instant case was built under the milling acts, the question of whether the forfeiture provision is applicable must be decided by reference to the milling act in force when such dam was built. *Norfolk & W. R. Co. v. Hayden*, 118.

The milling act of February, 1745 (5 Hen. Stat. 360), the act in force when the dam in the instant case was built, provided no forfeiture penalty in case the mill was rendered unfit for use and not rebuilt within a certain time. There is, therefore, nothing in that act to take the case out of the

MILLS AND MILLDAMS—Continued.**Forfeiture under Milling Act—Continued.**

operation of the statute of limitations, as stated in the first syllabus. *Norfolk & W. R. Co. v. Hayden*, 118.

Where the predecessors in title of the defendant owned the land on both sides of the stream, on which the dam was built, the forfeiture penalty provision of the milling act of October, 1785 (12 Hen. Stat. 187), extending only to the forfeiture of the one acre of land condemned for the abutment of one end of the dam to rest on, could not apply. *Norfolk & W. R. Co. v. Hayden*, 118.

Limitation of Actions.—Flooding lands where dam is erected under milling acts. *Norfolk & W. R. Co. v. Hayden*, 118.

Retroactive Construction of Milling Acts.—The milling act forfeiture provision, as contained in the Code of 1887, section 1356, providing that if a mill be at any time rendered unfit for use and the rebuilding or repair thereof shall not within two years from the time of such unfitness be commenced, "the title to the land so circumstanced shall revert to the former owner, his heirs or assigns and the leave so granted shall be in force no longer," is not retroactive, and the same is true of all the preceding milling acts. *Norfolk & W. R. Co. v. Hayden*, 118.

MINES AND MINERALS. See MASTER AND SERVANT.

Construction of Lease.—See *infra*, "Lease."

Forfeiture.—See *infra*, "Lease."

Instructions.—See *infra*, "Lease."

Lease.—Forfeiture.—A mining lease contained a clause providing that a failure to operate the mines for three months should *ipso facto* work a forfeiture of the lease. Another clause provided that the failure of the lessee to perform any of the covenants and agreements of the lease for a period of thirty days should be deemed, at the option of the lessor, to work a forfeiture. It was contended by the lessee that the latter clause gave him the benefit of an additional thirty days before the forfeiture provided for in the first clause became effective, but it was held under familiar rules of construction that the lease must be interpreted as a whole and in such a way as to give effect to all its provisions; that the latter clause was a general forfeiture clause, applying to the many "covenants and agreements" of the lessee contained in the lease, and the former clause a specific provision covering specific situations. *Matoaka Coal v. Clinch Valley Min.*, 522.

MINES AND MINERALS—Continued.

Lease—Continued.

A mining lease provided for forfeiture if the lessee should cease to operate the mines for a period of three months, unless the delay was unavoidable and caused by circumstances beyond the control of the lessee. To excuse its failure to operate the mines, the lessee alleged a general strike at the mines and a mountain slide covering the tracks over which the coal had to be shipped. It appeared from the evidence that the lessee was practically bankrupt, that its plant was in poor condition, and that the few laborers who were there when the mines closed, quit work because of unsatisfactory conditions, due primarily to defendant's lack of funds. The slide referred to was shown to have been of trifling consequence. Held: That there was neither a strike nor a slide of such a character as to excuse the lessee from the operation of the mines according to contract, and that defendant was not entitled to an instruction regarding these alleged excuses. *Matoaka Coal v. Clinch Valley Min.*, 522.

A mining lease provided for forfeiture upon failure to operate the mines for three months. Held: That, where the lessee had been notified that it would not be further indulged and would be expected thereafter to meet the requirements of the lease, a later notice upon its coming to the knowledge of the lessor that the mines were not being operated, that a forfeiture would be enforced if the lease was not complied with, could not be construed as extending the period during which the non-operation of the mines would not work a forfeiture. *Matoaka Coal v. Clinch Valley Min.*, 522.

In an action of ejectment by a lessor to recover mining property, the lease of which he alleged had been forfeited, an instruction that if the defendant company failed to pay the royalties when due, and such failure continued for a period of more than thirty days prior to the institution of the suit, the jury should find for the plaintiff, unless they believed "that the same was waived by the plaintiff," is not ambiguous, and liable to lead the jury to believe that it had reference to a waiver of the royalties themselves instead of a waiver of the forfeiture. *Matoaka Coal v. Clinch Valley Min.*, 522.

In an action to enforce the forfeiture of a mining lease, it was not error to refuse an instruction that "if the plaintiff declared a forfeiture on one ground, with knowledge of other grounds of forfeiture, it must stand or fall upon the ground declared," where it appeared that plaintiff had told defendant that it intended to declare a forfeiture upon the ground of non-operation of the mines, but when the action was tried,

MINES AND MINERALS—Continued.**Lease—Continued.**

the plaintiff was required, upon the defendant's motion, to file a bill of particulars of its claim, and in doing so it set out a large number of additional grounds, including the failure to pay royalties, all of which were negated in a statement of the grounds of defense, and the case was tried upon the issues as thus defined. One of the grounds of defense was that the plaintiff failed to give the defendant notice of any ground of forfeiture prior to the institution of the suit. Therefore, defendant cannot afterwards maintain that plaintiff did give notice of one distinct ground of forfeiture to the exclusion of all others. *Matoaka Coal v. Clinch Valley Min.*, 522.

Parties to Action.—One operating mines under a contract with a lessee which gave him exclusive possession thereof for the time being, but whose possession was not exclusive of and was subordinate to the possession of the entire tract by the lessee, is not the party actually occupying the premises, as those terms are used in section 2726, Code of 1904. *Matoaka Coal v. Clinch Valley Min.*, 522.

Negligence.—See MASTER AND SERVANT.

MOOT QUESTION. See APPEAL AND ERROR.

MORTGAGES AND DEEDS OF TRUST. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Acknowledgments.—See ACKNOWLEDGMENTS.

Deed of Trust Reserving Power of Sale to Grantor.—A deed of trust provided that until default should be made in the payment of the principal or interest of any of the bonds secured by it, the trustee should permit the grantor to sell the property covered by the deed, provided, however, that in the event of a sale of the property, the proceeds should be reinvested in other property, which should immediately become subject to the deed of trust. Held: That the absolute power of sale reserved to the grantor in the deed, as a matter of law, rendered it *per se* fraudulent and void under section 2458 of the Code of 1904. *Consolidated Tramway Co. v. Germania Bank*, 331.

Ejectment.—An outstanding unsatisfied mortgage or deed of trust on land to secure a debt is regarded as a mere lien, and the mortgagor or grantor may still maintain ejectment in his own name, and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action. While technically the legal title is in the trustee,

MORTGAGES AND DEEDS OF TRUST—Continued.**Ejectment—Continued.**

it is only vested in him for a definite purpose, namely, to secure the debt. Such a deed should be construed in actions of ejectment as a mere lien upon the property. *Gravatt v. Lane*, 44.

Estoppel.—A tract of land described in the declaration in an action of ejectment was known as the "Badkins Tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, was the "Cranston Mill-pond." This pond or dam has been down a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins Tract." The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which calls for the pond as a boundary, carry her title to the center of the stream. Assuming that the deeds under which the plaintiff claims the "Badkins Tract" did extend to the middle thread of the stream, forming the mill-pond, the grantors were not estopped from subsequently purchasing an adverse title to the land in dispute and would not have been estopped from purchasing the entire tract, because their deed to plaintiff's grantor was made merely for the purpose of securing a debt, contained no warranty of title, and "the grantor undertook no responsibility either as to title or quantity." *Jennings v. Marston*, 79.

Trustee.—See ACKNOWLEDGMENTS.

MOTION TO QUASH. See ATTACHMENT AND GARNISHMENT.

MULTIFARIOUSNESS.

Demurrer.—Where the trial court sustained a demurrer and entertained an amendment which showed that the complainants were bound to fail in their proof upon one branch of their case, it was error to dismiss the bill of multifariousness. The court ought to have treated as surplusage the allegations relating to this branch of the case or ought to have reserved to complainants the right to amend by striking out these allegations. *Matney v. Yates*, 506.

Multiplicity of Suits.—It is the policy of the law to avoid a multiplicity of suits, and to reject the objection for multifariousness where there is no liability to injustice. *Matney v. Yates*, 506.

MULTIFARIOUSNESS—Continued.

Streets and Highways.—Complainant in a bill in equity sought to redress a wrong done him as an individual, by the grading of a street in front of his premises, and also an injury to him as a citizen of a municipality, in that the bond required of the contractor for the grading had not been given and that a member of the street committee who was charged with the duty of assessing the damage to his property had an interest in the contract for doing the grading. As a waiver of the contractor's bond was within the discretion of the town council and not a matter of which a citizen could complain, the bill was not multifarious. The mere assertion of a right which the court will not enforce will not render a bill multifarious. The right sought to be enforced was within the discretionary powers of the council, with which the courts will not interfere, and the allegation that a member of the street committee was interested in the contract for grading is a mere incident of the gravamen of the bill and does not render the bill multifarious. As regards multifariousness, each case must be decided on its own facts. *Appalachia v. Mainous*, 666.

What Constitutes.—Where a bill has a single, ultimate object in view, namely, to perfect the record title to land, which complainants claimed they owned in fee simple, and sought to attain this purpose, first, by establishing a lost deed, and secondly, by obtaining release deeds from other claimants, there was nothing inconsistent in attempting to accomplish this single purpose in either of the two ways indicated in the bill, and therefore the bill was not multifarious. *Matney v. Yates*, 506.

MULTIPLICITY OF SUITS.

Multifariousness.—It is the policy of the law to avoid a multiplicity of suits, and to reject the objection for multifariousness where there is no liability to injustice. *Matney v. Yates*, 506.

MUNICIPAL CORPORATIONS.

Discretion of Council. See **STREETS AND HIGHWAYS**.

Streets.—See **STREETS AND HIGHWAYS**.

MUNICIPAL, STATE AND COUNTY SECURITIES.

Authority to Issue Bonds Mandatory or Permissive.—The title of an act was, "An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, or so much thereof as may be necessary," etc., and by the enacting clause the

MUNICIPAL, STATE AND COUNTY SECURITIES—Continued.

Authority to Issue Bonds Mandatory or Permissive—Continued.

board was *authorized and empowered* to borrow \$90,000, or *so much thereof as may be necessary* for the purposes declared. This language is not equivocal, but is plain and unambiguous, and the circumstances of the case do not disclose any duty resting upon the board to exercise the power conferred. They were given a discretion in the matter, which they exercised when they refused to issue the bonds, and the lower court was without jurisdiction to set aside or annul their action. *Board of Supervisors v. Cahoon*, 768.

NEGLIGENCE.

Automobiles.—See AUTOMOBILES.

Contributory Negligence.—See CROSSINGS; LAST CLEAR CHANCE; MASTER AND SERVANT; STREET RAILROADS.

Crossings.—See CROSSINGS.

Last Clear Chance.—See LAST CLEAR CHANCE.

Presumption and Burden of Proof.—*Virginia Iron, etc., Co. v. Prophet*, 685.

Superseding Cause.—A cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury. The intervention of the derailed car as described in the next syllabus was not a superseding cause of the injury. *Clinchfield Coal Corp. v. Ray*, 318.

Crossings.—See CROSSINGS.

Last Clear Chance.—See LAST CLEAR CHANCE.

Liability of Gratuitous Agent or Bailee.—An agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. This is the general rule; and it is the rule applicable to the instant case. There is nothing in the evidence to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject of the agency. *Yates v. Ley*, 265.

Master and Servant.—See MASTER AND SERVANT.

Mines and Minerals.—See MASTER AND SERVANT.

"Ordinary Care."—*Seaboard A. L. Ry. v. Abernathy*, 173.

NEGLIGENCE—Continued.

Proximate and Remote Cause.—See **STREET RAILROADS.**

A cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury. The intervention of the derailed car as described in the next syllabus was not a superseding cause of the injury. *Clinchfield Coal Corp. v. Ray*, 318.

In an action for injuries to plaintiff's automobile by the train of defendant at a public crossing, where the doctrine of the last clear chance was applicable, a number of other questions were raised with respect to the negligence of defendant and the contributory negligence of the plaintiff in certain particulars. Held: That if both defendant and plaintiff were negligent in such matters respectively, it was manifest that none of them were the proximate cause of the injury, since the doctrine of the last clear chance was applicable. *Norfolk Sou. R. Co. v. Whitehead*, 139.

Questions of Law and Fact.—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ as to the negligence charged, the question is not one of law but of fact to be determined by the jury under proper instructions from the court. In such case, if the jury might have found for the plaintiff, on the defendant's demurrer to the evidence, the court must so find. *Seaboard A. L. Ry. v. Abernathy*, 173.

Superseding Cause.—See *infra*, "Contributory Negligence."

NEGOTIABLE INSTRUMENT. See **BILLS, NOTES AND CHECKS.**

NEWLY DISCOVERED EVIDENCE. See **NEW TRIALS.**

NEW TRIALS.

Conclusiveness of Verdict.—See *infra*, "Conflicting Evidence."

Conflicting Evidence.—See **APPEAL AND ERROR.**

A commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable. *Alexander v. Critcher*, 723.

Defendant contended that he had no actual knowledge of the custom or usage of the trade in question, and that it was not sufficiently certain and notorious to give rise to a

NEW TRIALS—Continued.

Conflicting Evidence—Continued.

presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal. *Walker v. Gateway Milling Co.*, 217.

In an action for death by wrongful act, the verdict of the jury for the plaintiff was rendered upon conflicting evidence and was approved by the trial court. From the standpoint of a demurrer to the evidence, the evidence was quite sufficient to sustain the verdict, and upon well-settled principles the Court of Appeals must accept the finding of the jury. *Virginia Iron, etc., Co. v. Prophet*, 685.

Where a question was resolved by the verdict of the jury in favor of the plaintiff on conflicting evidence, the verdict ought not to be disturbed, provided the case was fairly submitted to the jury on the instructions. *Turner v. Richmond & R. R. Co.*, 194.

Where the jury has decided a question of fact upon conflicting evidence, their verdict is conclusive. *Norfolk Hosiery Co. v. Westheimer*, 130.

In an action of ejectment, the questions at issue were whether the plaintiff had shown the location of the land in question in a certain block of a survey, and whether defendants had shown adverse possession under color of title of the land claimed by them, or any part thereof, within an interlock, for ten years since the senior title of plaintiff accrued. As both these propositions involved jury questions, and both, upon highly conflicting evidence, were fairly submitted to and passed upon by the jury in favor of the plaintiff, their findings upon the facts, approved by the trial court, were beyond the cognizance of the Supreme Court of Appeals. *Sutherland v. Gent*, 643.

Crossings.—In the instant case there was gross negligence on the part of the defendant company's servants in sending four cars down an incline without any efficient control. Just such an accident to some traveler upon the highway as happened might have been anticipated from such a movement, and the question of the plaintiff's contributory negligence was one about which fair-minded men might honestly differ, and was, therefore, properly submitted to the jury. Where the negligence of defendant railroad is clearly established, and the question of the contributory negligence of the plaintiff is properly submitted to the jury, the verdict of the jury will not be set aside as contrary to the law and the evidence. *Seaboard A. L. Ry. v. Abernathy*, 173.

NEW TRIALS—Continued.**Crossings—Continued.**

Cumulative Evidence.—Although the newly discovered evidence may tend to prove the same issue as the evidence introduced on the former trial, yet if dissimilar in kind, it is not cumulative. In the instant case the fact testified to by the defendant and his witness tended to prove the same proposition which the after discovered evidence tended to prove, namely, that there were goods in possession of the plaintiff derived from his transactions with the defendant and for which the latter should have had credit; the former evidence consisted of the bare statements of the fact of the existence of such goods and of the plaintiff having left the home of defendant with them or of his having carried them away; the latter evidence was more specific, stated facts attending the carrying away of the goods, subsequent in point of time to the status of the case on the subject of the existence of the goods as left by the testimony on the former trial, showed that the conveying away was secretive, also was positive proof, if true, of the place to which the goods were taken, etc., in short was more circumstantial and was evidence of a different kind and character from that introduced on the subject of the goods at the former trial. *Barsa v. Kator*, 290.

Demurrer to Evidence.—The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor. Accordingly, where the plaintiff assigns as error the action of the court below, first, in setting aside a verdict in his favor, and, second, in sustaining defendant's demurrer to the evidence, the appellate court will consider only the action of the court below upon the demurrer to the evidence. *Wadkins v. Damascus Lumber Co.*, 691.

Divorce.—See *infra*, "Verdict Contrary to or Against Weight of Evidence."

Due Diligence.—Where a witness whose testimony is relied upon as newly discovered, although a relative of the party seeking the new trial, had for ten months prior to the trial been living in another State, and was living there at the time of the trial, and the character of a material part of his evidence was such that it was not probable that by the exercise of reasonable forethought it would have occurred to the party to inquire of the witness concerning it, the non-production of his testimony at the trial does not show a want of diligence. *Barsa v. Kator*, 290.

NEW TRIALS—Continued.

Newly Discovered Evidence.—See *infra*, "Cumulative Evidence;" "Due Diligence."

After discovered evidence which was held not to be cumulative, nor merely corroborative, nor collateral, nor in impeachment of former witnesses, but to fall within all the rules governing the subject. *Barsa v. Kator*, 290.

In order to afford a proper ground for granting a new trial, the newly discovered evidence must have been discovered since the former trial; be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial; must be material in its object, and not merely cumulative, corroborative and collateral; must be such as ought to produce, on another trial, an opposite result on the merits; and must go to the merits of the case, and not merely to impeach the character of a former witness. Unless these circumstances concur a new trial is never granted on the ground of after discovered evidence, and even where they do concur a new trial is granted only with great reluctance and with special care and caution. *Barsa v. Kator*, 290.

Successive Trials.—See APPEAL AND ERROR.

Verdict Contrary to or Against Weight of Evidence.—See *infra*, "Conflicting Evidence;" "Crossings."

In an action against a master by his servant, a track repairer, for injuries sustained while working in a mine, the verdict of the jury is conclusive on such questions as the contributory negligence of the plaintiff and that the defendant could not have reasonably anticipated a collision resulting in injury to the plaintiff, when the questions were submitted to the jury upon full and fair instructions. *Clinchfield Coal Corp. v. Ray*, 318.

Where the question as to the cause of the accident and the manner of its occurrence have been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence. *The Ferries Co. v. Brown*, 13.

Action for Divorce for Adultery.—In an action for divorce adultery, the establishment of the charge of adultery depended on the testimony of two small boys, children of the parties, aged, respectively, nine and twelve years. The Supreme Court of Appeals refused to sustain an assignment of error that the court below erred in holding that the evi-

NEW TRIALS—Continued.**Verdict Contrary to or Against Weight of Evidence—Continued.***Action for Divorce for Adultery—Continued.*

dence was sufficient to sustain the charge of adultery. While expressing regret that children of any age, and especially those of such tender years, should be involved as witnesses in cases of this character, the court was constrained, as was the court below, upon a careful consideration of the record, to the conclusion that the testimony of these two boys was substantially true. *White v. White*, 244.

NONSUIT. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

NOTARY PUBLIC.

Acknowledgments.—See ACKNOWLEDGMENTS.

Agency.—Plaintiff contended that defendant, the cashier of a bank and a notary public, was her agent in negotiating and placing a loan, and was liable for a loss occasioned by his taking the acknowledgment to a deed of trust in which he was named as trustee. Defendant introduced evidence that the transaction in question was conducted by plaintiff's nephew, a law student; that he was not plaintiff's adviser and did nothing more in negotiating the loan than to tell her nephew that he thought the property was worth the debt; that he was named as trustee without his knowledge; and, that if he had known that he was trustee he would not have known that this fact affected the validity of the acknowledgment. There was other evidence supporting defendant's position, that, if he was the plaintiff's agent or bailee in any sense at all, he was so merely in a gratuitous capacity and at most could only be held liable for gross negligence. Held: That there was ample evidence upon which to base a verdict for defendant. *Yates v. Ley*, 265.

Liability.—A notary public is not liable for a loss resulting from the fact that, within his jurisdiction and in good faith, he took and certified a void acknowledgment to a deed. *Yates v. Ley*, 265.

The taking of an acknowledgment to a deed by a notary public is, under the law of Virginia, a judicial act and a notary public is by the law of Virginia authorized to take acknowledgments to deeds of all persons appearing before him for that purpose, within the limits of the county or city for which he is appointed; and the question as to whether or not he can take a valid acknowledgment to a deed, in which he is named as trustee, is a question of law, and for

NOTARY PUBLIC—Continued.**Liability—Continued.**

an error on the part of a notary public in taking an acknowledgment as such and in good faith to any deed to which he is a party as trustee, he is not liable for damages to a party who suffers damage or loss thereby. *Yates v. Ley*, 265.

NOTICE.

Agency.—Notice to an agent of a party is constructive and not actual notice to the principal. But where one claims as purchaser for value without notice, it is immaterial whether the notice was actual or constructive. *Steinman v. Clinchfield Coal Corp.*, 611.

Purchaser for Value and Without Notice.—See *LIS PENDENS*; *RECORDING ACTS*; *VENDOR AND PURCHASER*.

NOTICE TO QUIT. See *LANDLORD AND TENANT*.

OFFICERS. See *COUNTIES*; *PUBLIC OFFICERS*.

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Directors.—Testimony as to statements made by a director of a bank, the holder of a note, to an endorser was properly excluded in an action against the drawer and endorser of the note. There being no suggestion that the director had any authority from the bank to make any special contract or agreement with the endorser, the unauthorized statements of the director could not affect the rights of the bank. *Triplett v. Second Nat. Bank*, 189.

Evidenc.—See *infra*, "Directors."

OPTIONS.

The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder, and the proceeds divided among his heirs. Defendant had acquired the option of the two sons to purchase, but as he had also acquired the interests of all the heirs in the estate, although unable to prove the purchase of the share of a deceased heir,

OPTIONS—Continued.

he thought there was no necessity for his making an election to purchase under the option. Held: As the defendant had the right to purchase the land at \$1,800, and in good faith believed he had purchased the share of the deceased heir, the heirs of such deceased heir having not asserted their claim before the institution of the suit, a forfeiture would not be enforced in their favor, but they should be restricted to their share of the \$1,800. The defendant having clearly elected to keep the land at \$1,800, no account should be taken of waste to or timber removed from the land by him. *Robinett v. Taylor*, 583.

Right to Transfer.—The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder. Held: That the privilege or option given to his two sons was a valuable one, and one which they had the right to transfer. *Robinett v. Taylor*, 583.

ORDER OF COURT.

Jurisdiction.—In order to enter valid orders a court must have jurisdiction of the cause in which such orders are entered, and no valid orders can be entered in a case which has been once finally disposed of, unless it has been first legally reinstated. *Snead v. Atkinson*, 182.

"ORDINARY CARE."

Definition.—*Seaboard A. L. Ry. v. Abernathy*, 173.

PARCENARY, ESTATES IN.

Adverse Possession.—See ADVERSE POSSESSION.

The possession of one joint tenant, tenant in common or parcener, is *prima facie* the possession of his fellow, and it follows that the possession of one is never adverse to the title of the other, unless there be proved an actual ouster of disseisin or other act amounting to a total denial of the cotenant's right as cotenant. *Baber v. Baber*, 740.

PARENT AND CHILD.

Agency.—Presumption of agency. *Blair v. Broadwater*, 301.

Automobiles.—See AUTOMOBILES.

PAROL EVIDENCE.

Boundaries.—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury, or by the court, by the aid of extrinsic evidence. *Asberry v. Mitchell*, 276.

Contracts.—The antecedent conversations and agreements between the parties, so far as they are in conflict with a written contract, cannot, of course, be received to vary or contradict it, but if its meaning be doubtful the surrounding circumstances, the condition and avowed purposes of the parties, as well as the subject matter of the contract, may be proved by parol testimony in order to enable the court to determine its meaning. *McCorkle & Son v. Kincaid*, 546.

Lost Instruments and Records.—Where the proof of the former existence of an instrument is strong and conclusive, even parol evidence of its contents is admissible, and if strong and convincing, will set up and establish the lost instrument. *Baber v. Baber*, 740.

Usages and Customs.—The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence. *Walker v. Gateway Milling Co.*, 217.

Vendor and Purchaser.—Where, in construing a contract of sale, the knowledge of the vendee of the prior conveyance of three acres of the land in question to another by the vendor, was a material fact for the court to know in determining the probable intention of the parties, the testimony of the husband of the vendee that the vendor had told him that after taking off the three acres from the tract 108 acres would remain, was not objectionable as in violation of the rule against the use of parol evidence to vary the terms of a written contract. *Riner v. Lester*, 563.

PARTICULARS. See BILL OF PARTICULARS.

PARTIES TO ACTION. See ABATEMENT AND REVIVAL; FORMER ADJUDICATION OR RES ADJUDICATA.

PARTIES TO ACTION—Continued.

Ejectment.—One operating mines under a contract with a lessee which gave him exclusive possession thereof for the time being, but whose possession was not exclusive of and was subordinate to the possession of the entire tract by the lessee, is not the party actually occupying the premises, as those terms are used in section 2726, Code of 1904. *Matoaka Coal v. Clinch Valley Min.*, 522.

Section 2726 of the Code of 1904 provides: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff may also at the discretion of the plaintiff be named defendants in the declaration." Prior to the amendment of this section by the act of February 26, 1896 (Acts 1895-6, p. 514), it directed that "the person actually occupying the premises shall be named defendant in the declaration." The purpose of the amendment seems to have been to permit the plaintiff to join with the occupant as defendants any other persons claiming title to the land; and it may be conceded that the actual occupant is always a necessary party defendant to an action of ejectment in the sense that another defendant may by timely and proper procedure compel the plaintiff to bring the occupant before the court. The presence of the occupant, however, is not essential to the jurisdiction of the court, and if the claimant of the premises who is sued does not appropriately raise the point, and defends the action upon the merits, he is bound by the judgment. *Matoaka Coal v. Clinch Valley Min.*, 522.

Where the plaintiff in actions *ex delicto* improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions *ex contractu*. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement. Consequently, defendant in ejectment under the general issue has no right to raise the question of the failure of the plaintiff to name as defendant the person actually occupying the premises. *Matoaka Coal v. Clinch Valley Min.*, 522.

Executors and Administrators.—As the personal property of the decedent is the primary fund for the payment of his debts, his personal representative is a necessary party to a suit

PARTIES TO ACTION—Continued.**Executors and Administrators—Continued.**

by which such fund is affected. He is a proper party to a suit by a judgment creditor to subject his debtor's lands to the lien of his judgment; but where the pleadings admit that the debtor died without personal assets and no relief is sought against his personal representative and no accounting by him is asked, he is not a necessary party. *Johnston v. Pearson*, 458.

Judgments and Decrees.—In a bill to subject land to the payment of a judgment against C., it was alleged that F., the former owner of the land, had conveyed the land to C., but that the deed had been lost. F. was directly interested to show that the land had not been paid for, or that he had not made any deed. The decree made in the case which set up the lost deed and subjected the land as the land of C. would ~~not have~~ been binding upon F. if he had not been a party to the suit, and he was at least a proper party, if not a necessary party, so as to give him an opportunity of defending his title, or if he admitted the conveyance of the title, to preclude him in the future and those claiming under him, from gainsaying C.'s title to the land. *Steinman v. Clinchfield Coal Corp.*, 611.

PARTITION.

Allotment in Kind.—See *infra*, "Sale."

Compliance with Statute.—*Roberts v. Hagan*, 573.

Construction of Deed.—In an action of ejectment, where it appears that the purpose of the parties to a deed was to make an equitable partition of a larger tract of land, a verdict of the jury sustaining a line established by definite landmarks set out in the deed will not be disturbed, where the line thus ascertained by the jury to be the true line makes a fair partition of the property and vests in the grantee of the deed at least 200 acres of the land, whereas the deed estimated his proportion of the land to be only 150 acres. And this notwithstanding the contention of the grantee that the deed to him only reserved 43 acres of the larger tract, and that the line between the two tracts should be surveyed so as to carry out this purpose. The tract was believed to contain about 196 acres, but in fact contained 258 acres. *Gravatt v. Lane*, 44.

Equity.—*Inherent Jurisdiction.*—*Roberts v. Hagan*, 573.

Insanity.—See **INSANITY**.

Purchaser.—By a proper method, under section 2564, Code of 1904, it would have been entirely within the power of the court in

PARTITION—Continued.**Purchaser—Continued.**

a suit for the partition of a decedent's estate by the purchaser of the interests of some of the heirs, to have assigned to the purchaser the entire estate to be partitioned, upon his payment to the other heirs of the amounts to which they would be entitled for their interests. But as section 2564 created and conferred a special statutory jurisdiction upon the court, a failure to comply with its provisions was fatal to the proceeding. Equity has no inherent jurisdiction to order a sale of land for the purpose of partition. *Roberts v. Hagan*, 573.

Sale.—See *infra*, "Purchaser."

Wherever, under section 2564 of the Code of 1904, there is a sale of a part and an allotment of the residue, the part allotted must be divided in kind, and the residue must be sold and the proceeds divided, the division in each case being made among all the parties in interest. *Roberts v. Hagan*, 573.

Sale of Undivided Interest.—Code of 1904, section 2564, provides that when partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it and pay for the other interests. Or if the interests of those who are entitled to the subject will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court may order such sale and allotment. There is no warrant in this section for selling by a public and enforced sale an undivided interest in the estate. The sale must be made in the execution of a general partition scheme, in which all the parties are given equal consideration. *Roberts v. Hagan*, 573.

Section 2564 of the Code of 1904.—*Roberts v. Hagan*, 573.

Undivided Interest.—See *infra*, "Sale of Undivided Interest."

PARTNERSHIP.

Damages.—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

PARTNERSHIP—Continued.**Damages—Continued.**

In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Exemplary Damages.—In an action against a partnership for a libel written by one partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Henry Myers & Co. v. Lewis*, 50.

Where an innocent partner subsequently ratified the tortious act of his partner in publishing a libel, the partnership is liable for exemplary or punitive damages. *Henry Myers & Co. v. Lewis*, 50.

Liability of Partner for Torts of Co-Partner.—Mere ratification is not itself a test of liability of one for the tortious act of another, much less is the receipt of a benefit from the tortious act such test, which in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification is material as bearing upon the measure of damages, but is not a true test of original liability. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment? *Henry Myers & Co. v. Lewis*, 50.

Where there is neither express authority in advance nor ratification afterwards, the test of the liability of the master or principal for the tortious act of the servant or agent,

PARTNERSHIP—Continued.**Liability of Partner for Torts of Co-Partner—Continued.**

is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a nontortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the *tortious manner* in which a transaction is conducted or a service is performed by his servant or agent, entrusted by the former to the latter to be conducted or performed for him in a nontortious manner. The same is true, of course, with respect to the liability of a partnership for a tort of an individual partner. *Henry Myers & Co. v. Lewis*, 50.

Libel and Slander.—See *infra*, "Damages."

Liability of Partnership for Libel Published by One of the Partners.—A partnership is liable for the writing by one partner, in the course of his conduct of the correspondence of the firm entrusted to him to conduct in a nontortious manner, of a libelous letter, for the purpose of obtaining from the recipient the payment of an alleged debt due the partnership. The tortious act complained of was incident to the employment, *i. e.*, within the ordinary course of the partnership business, within the scope of the authority of the acting partner, and, hence, the firm was liable for compensatory damages for the tortious manner in which the latter conducted such correspondence. *Henry Myers & Co. v. Lewis*, 50.

PAYMENT.

Protest.—Filing protest does not make a payment involuntary. *Barrow v. Prince Edward Co.*, 1.

Voluntary Payment.—See *infra*, "Protest."

Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, as to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary. *Barrow v. Prince Edward Co.*, 1.

PERMISSIVE STATUTE. See STATUTES.

PERSONAL INJURIES. See MASTER AND SERVANT; NEGLIGENCE; RELEASE.

PHYSICIANS AND SURGEONS.

Prosecution for Practicing without Having Procured a Certificate.

—Accused, at the time of the prosecution, was a non-itinerant optician engaged in the practice of optometry, and had been so employed since the year 1884. He had the following display letters on the front door and windows of his place of business: "Dr. J. Harry Martin, Incorporated, Eyes Exclusively," and "Dr. J. Harry Martin, Incorporated, Optometrist." It did not appear that accused had ever practiced or offered to practice medicine or surgery either in the city of Roanoke or elsewhere. Held: The accused was exempt from prosecution under chapter 84, section 12, Acts 1916, pages 138, 147, as the accused was included in the exemption of section 11, of "any non-itinerant person or manufacturer who mechanically fits or sells lenses, artificial eyes, * * * or is engaged in the mechanical examination of eyes for the purpose of adjusting spectacles, eye-glasses or lenses; * * *." *Martin v. Commonwealth*, 808.

PLAT. See STREETS AND HIGHWAYS.

PLEADING. See VARIANCE.

Affidavit of Defense.—See ASSUMPSIT.

Answers.—See ANSWERS.

Bill of Particulars.—See BILL OF PARTICULARS.

Declaration.—*Argumentativeness*.—See DEAD BODIES.

Master and Servant.—See MASTER AND SERVANT.

Sufficiency.—The declaration referred to in the preceding headnote measures up to the requirement of the rule, that it must state a case, and set forth "the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment." *Gaulding v. Virginian Railway Co.* 19.

The test of the sufficiency of every declaration is, does it state a case, and does it state the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment. *Brotherhood of R. T. v. Vickers*, 311.

Divorce.—See DIVORCE.

Equity.—See EQUITY.

PLEADING—Continued.

Execution and Proof of Documents.—See **EXECUTION AND PROOF OF DOCUMENTS.**

Issue Not Made by the Pleadings.—In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

Proof of Documents.—See **EXECUTION AND PROOF OF DOCUMENTS.**

Record.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

PRAYER FOR GENERAL RELIEF. See **EQUITY.**

PRESUMPTIONS AND BURDEN OF PROOF.

Appeal and Error.—See **APPEAL AND ERROR.**

Constitutional Law.—Presumption as to the meaning of words and phrases. *Pine v. Commonwealth*, 812.

The mere enactment of a law is a legislative declaration of the necessary constitutional power, which is entitled to great respect from a co-ordinate department of the government; every act is presumed to be constitutional until the contrary is made plainly to appear, and all doubts on the subject are to be solved in favor of its validity. *Pine v. Commonwealth*, 812.

Contributory Negligence.—*Virginia Iron, etc., Co. v. Prophet*, 685.

Divorce.—See **DIVORCE.**

Domicil.—It being established that from his childhood to 1905 a person's domicil was in another State, the burden is upon those who allege change of domicil to establish it. *Cooper's Adm'r v. Commonwealth*, 338.

Judgments and Decrees.—There is a presumption in favor of the decree of a trial court, and this presumption is entitled to especial consideration when the decree is based on uncertain and conflicting testimony. *Alexander v. Critcher*, 723.

Master in Chancery.—See *infra*, "Report of Commissioner."

PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Recording Acts.—Plaintiff claimed to be a purchaser for value without notice of a prior deed, under which defendant claimed. Defendant attempted to show that even if the plaintiff was a purchaser for value, he was a purchaser with notice of the defendant's title. Held: That the burden was upon the plaintiff to show that he was a purchaser for value, and that the purchase price had been actually paid before notice of the defendant's title; and that the burden of showing notice rested upon the defendant. *Steinman v. Clinchfield Coal Corp.*, 611.

Release.—The court instructed the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in no wise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request. *The Ferries Co. v. Brown*, 13.

Report of Commissioner.—There is a strong presumption in the appellate court in favor of a decree by which the trial court has confirmed the report of a commissioner upon a question of fact. *Maddux v. Buchanan*, 102. *Alexander v. Critcher*, 723.

Trespass.—Every trespass is *prima facie* willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appear from the evidence for the plaintiff, to show that the trespass was not willful. *Wood and Others v. Weaver*, 250.

Wills.—See **WILLS**.

PRINCIPAL AND AGENT. See **AGENCY**.

PRINCIPAL AND SURETY. See **SURETYSHIP**.

PRIVATE CROSSINGS. See **CROSSINGS**.

PRIVATE WAYS.

Compensation for Granting.—In effecting a sale of timber on land which he held in common with appellees and others, appellant also granted to the purchaser of the timber, as part of the consideration for the purchase price, a right of way over a

PRIVATE WAYS—Continued.**Compensation for Granting—Continued.**

tract of which he was sole owner. Held: That the proper measure of compensation for the right of way was the price therefor at which the appellant, under the circumstances, could reasonably have expected to sell it, in connection with the sale of his interest and the other interests which he was authorized to sell in the timber, and in connection also with the sale of the timber on his own tract, and not its salable or condemnation value, independent of its acquisition by the vendee in connection with the purchase of the timber. Nor would a valuation of the right of way on the basis of the price at which the timber in which appellees were interested would have sold, independently and separately from the sale of the timber on appellant's own tract and the right of way across it, be a correct measure of its value. *Harman v. Moss*, 399.

Crossings.—See **CROSSINGS**.

PRIVIES. See **FORMER ADJUDICATION OR RES ADJUDICATA**.

PRIVILEGED COMMUNICATIONS. See **WITNESSES**.

PROBATE. See **EXECUTORS AND ADMINISTRATORS; JURISDICTION**.

PROCESS. See **SERVICE OF PROCESS; SUMMONS AND PROCESS**.

PROMISSORY NOTE. See **BILLS, NOTES AND CHECKS**.

PROPERTY.

The word "property" is comprehensive enough to cover real estate as well as personal property. *Robinett v. Taylor*, 583.

PROTEST. See **PAYMENT**.

PROXIMATE AND REMOTE CAUSE. See **NEGLIGENCE**.

PUBLIC LANDS.

Adverse Possession.—See *infra*, "Interlocks."

Interlocks.—Where one grant conflicts in part with another, occasioning an interlock, the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee, under his grant, acquires similar constructive seisin in deed of

PUBLIC LANDS—Continued.**Interlocks—Continued.**

all the land embraced by his boundaries, except that portion within the interlock, the seisin of which has already vested in the senior grantee. Where, in the case of conflicting grants, the junior patentee settles upon that portion of the land within the interlock, claiming the whole within his boundary, he thereby ousts the senior patentee of his constructive seisin and becomes actually possessed to the extent of his grant. Here possession of part is possession of the whole. But if his settlement is outside of the interlock, the possession of part is to be construed in reference to the conflict of boundaries, and, with whatever claim it be taken, it gives him possession of that part of the land only lying without the interlock. To overcome the constructive seisin in deed of the senior patentee and work an ouster, there must be an actual invasion of his boundary by some act or acts palpable to the senses and which would serve to admonish him that his seisin is molested. *Sutherland v. Gent*, 643.

PUBLIC OFFICERS.

County Officers.—See COUNTIES.

Liability.—Public officers who erroneously exercise judicial functions are not liable therefor in damages in any case in which they have acted within their jurisdiction and in good faith. *Yates v. Ley*, 265.

PUNITORY DAMAGES. See EXEMPLARY DAMAGES.

PURCHASER. See VENDOR AND PURCHASER.

PURCHASER FOR VALUE AND WITHOUT NOTICE. See LIS PENDENS; RECORDING ACTS; VENDOR AND PURCHASER.

QUESTIONS OF LAW AND FACT.

Construction.—See *infra*, "Contracts."

Contracts.—Although it is error for an instruction to submit to the jury the construction of a contract when it was the duty of the court to construe it, yet where the error is favorable to the plaintiffs in error and not injurious to them, it is harmless as to them. *McCorkle & Son v. Kincaid*, 546.

Where the true meaning of the terms of a contract depended upon controverted facts and conflicting evidence, the question was one for the jury, upon proper instructions, to determine. *Walker v. Gateway Milling Co.*, 217.

QUESTIONS OF LAW AND FACT—Continued.

Master and Servant.—The question as to the cause of the accident and the manner of its occurrence having been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence. *The Ferries Co. v. Brown*, 13.

Where the alleged cause of danger is so open and obvious, and the opportunity or knowledge on the part of the employee is so complete as to leave no doubt that he knew, or should have known all about it, the question of whether he should have been warned is one of law for the court. *Lynchburg Foundry Co. v. Dalton*, 480.

Whether or not a servant knew or ought to have known of the dangerous condition of his place of work and hence assumed the risk thereof is a question for the jury, when the danger is not so open and obvious and not so apparent as to charge him with knowledge thereof as a matter of law. *Turner v. Richmond & R. R. Co.*, 194.

Negligence.—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ as to the negligence charged, the question is not one of law but of fact to be determined by the jury under proper instructions from the court. In such case, if the jury might have found for the plaintiff, on the defendant's demurrer to the evidence, the court must so find. *Seaboard A. L. Ry. v. Abernathy*, 173.

RAILROADS. See CARRIERS.

Corporation Commission.—See CORPORATIONS.

Crossings.—See CROSSINGS.

Dead Bodies.—See DEAD BODIES.

Dissolution.—See CORPORATIONS.

Injuries to Persons on or Near Tracks or Premises.—*Last Clear Chance.*—Evidence warranting the jury in finding that the engineer in charge of the defendant's train, by keeping a reasonable lookout, inevitably must have discovered plaintiff's intestate on the track in time to have averted the accident; and, moreover, they might have found the existence of sufficient superadded facts and circumstances "to put a reasonable man upon his guard that the person upon the track pays no heed to his danger and will take no step to secure his own safety." *Kabler's Adm'r v. Southern Ry. Co.*, 90.

The last clear chance rule, which has frequently been applied to cases in which the plaintiff's negligence has con-

RAILROADS—Continued.**Injuries to Persons on or Near Tracks or Premises—Continued.**

tinued to the very moment of the injury, is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may, nevertheless, recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so. *Kabler's Adm'r v. Southern Ry. Co.*, 90.

Licensee.—Where the evidence shows that the track where the casualty occurred habitually for many years with the knowledge of defendant had been used as a walkway by the public, it will be assumed that the decedent who met his death by being struck by an engine of defendant company at this point was a licensee to whom it owed the duty of ordinary care to avoid injuring him. *Kabler's Adm'r v. Southern Ry. Co.*, 90.

Last Clear Chance.—See **LAST CLEAR CHANCE**.

License.—See *infra*, "Injuries to Persons on or Near Tracks or Premises."

Street Railroads.—See **STREET RAILROADS**.

Train Sheets.—See **DOCUMENTARY EVIDENCE**.

Voluntary Dissolution.—See **CORPORATIONS**.

REAL ESTATE BROKERS. See BROKERS.**REAL PROPERTY. See LANDLORD AND TENANT; TREES AND TIMBER; VENDOR AND PURCHASER.**

Contract for Sale of Real Estate.—See **BROKERS**.

Parol Gift of Land.—See **FRAUDS, STATUTE OF**.

RECEIPT.

"In Full."—Where a servant had endorsed and used a check of his master, containing the entry on its face "in full to July 1, 1915," this constitutes *prima facie* evidence that such payment was in full of the servant's salary to July 1, 1915. But it was *prima facie* evidence only of such fact. The servant was at liberty, notwithstanding his acceptance and use of such check, to prove the correct status of the account between him and his master. The acceptance and use of such check merely placed the burden of proof upon the servant. *Norfolk Hosiery Co. v. Westheimer*, 130.

RECEIVERS.

Corporations.—Upon the filing of a certificate of unanimous consent of stockholders to the dissolution of a corporation, as provided by section 1105-e, subsection 30, Code of 1904, with the State Corporation Commission, the sole question before that body was whether the company had complied with the law entitling it to a certificate of dissolution. If it had, it was the duty of the commission to issue the certificate, and no court (except on appeal) could enter any order that would "interfere with the commission in the performance of its official duties." And the appointment of a receiver for the corporation between the filing of the certificate of consent and its final amendment as to signature and execution, is no reason for refusing a certificate of dissolution, if otherwise it should have been granted. *Jeffries v. Com.*, 425.

RECORDING ACTS.

Judgments and Decrees.—Parties to judgments and decrees, and their privies, are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself. *Steinman v. Clinchfield Coal Corp.*, 611.

Mechanics' Liens.—See **MECHANICS' LIENS.**

Presumptions and Burden of Proof.—Plaintiff claimed to be a purchaser for value without notice of a prior deed, under which defendant claimed. Defendant attempted to show that even if the plaintiff was a purchaser for value, he was a purchaser with notice of the defendant's title. Held: That the burden was upon the plaintiff to show that he was a purchaser for value, and that the purchase price had been actually paid before notice of the defendant's title; and that the burden of showing notice rested upon the defendant. *Steinman v. Clinchfield Coal Corp.*, 611.

Purchaser for Value and without Notice.—See **LIS PENDENS; VENDOR AND PURCHASER.**

Notice to an agent of a party is constructive and not actual notice to the principal. But where one claims as purchaser for value without notice, it is immaterial whether the notice was actual or constructive. *Steinman v. Clinchfield Coal Corp.*, 611.

Plaintiff claimed to be a purchaser for value without notice of a prior deed, under which defendant claimed. Defendant attempted to show that even if the plaintiff was a purchaser for value, he was a purchaser with notice of the

RECORDING ACTS—Continued.**Purchaser for Value and without Notice—Continued.**

defendant's title. Held: That the burden was upon the plaintiff to show that he was a purchaser for value, and that the purchase price had been actually paid before notice of the defendant's title; and that the burden of showing notice rested upon the defendant. *Steinman v. Clinchfield Coal Corp.*, 611.

Under section 2465, Code of 1904, an unrecorded deed is void as to a subsequent purchaser for value and without notice, and to constitute a purchaser for value in this State, it is not required that the consideration should be either fair or adequate, as is required in some States, but simply that the purchase should be for value; and even where adequate consideration is required it has been held that "no consideration of any value at all, upon which parties capable of contracting with each other, and in the absence of fraud, may agree, can be said, in a legal sense, to be inadequate." *Steinman v. Clinchfield Coal Corp.*, 611.

Suit for the Recovery of Land.—A suit to subject land to the payment of a judgment is not a suit for the recovery of land, and section 2510 of the Code of 1904, providing for the record of any recovery of land under judgment or decree, has no application to the decree rendered therein. *Steinman v. Clinchfield Coal Corp.*, 611.

RECORDS. See **APPEAL AND ERROR; LOST INSTRUMENTS AND RECORDS.**

Certiorari.—See **CERTIORARI.**

Demurrer to the Evidence.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

Indexing.—See **CLERKS OF COURT.**

Pleading.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are *per se* a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 480.

REDEMPTION. See **TAXATION.**

REHEARING.

Review.—An erroneous petition for rehearing, where the court by entering a final decree in vacation had lost control of the cause, may be treated as a bill of review, where it plainly sought to correct an error of law apparent upon the face of the record, and was, in substance, a bill of review, which is the appropriate proceeding for the correction of a final decree by the court in which it has been rendered. *Matney v. Yates*, 506.

REINSTATEMENT. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

RELEASE. See BILLS, NOTES AND CHECKS.

Consideration.—A release not under seal requires the support of a valuable consideration. *The Ferries Co. v. Brown*, 13.

Fraud and Deceit.—The court instructed the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request. *The Ferries Co. v. Brown*, 13.

Instructions.— See *infra*, "Presumption and Burden of Proof."

Master and Servant.—Plaintiff, a servant of defendant's, had executed an instrument releasing defendant from liability for injuries sustained by plaintiff while in the employment of defendant. In an action by plaintiff against defendant for personal injuries, defendant requested the following instruction: "The jury are instructed that if they believe from the evidence that the plaintiff executed the release exhibited, they must find for the defendant." There was no error in refusing this instruction. The plaintiff was attacking the release referred to upon the ground that it was without consideration, and that it had been procured by fraud. There was evidence tending to support this attack in both aspects, and the instruction ignored both and directed a verdict for the defendant. *The Ferries Co. v. Brown*, 13.

Presumptions and Burden of Proof.—The court instructed the jury that unless they believe from the evidence that the release

RELEASE—Continued.**Presumptions and Burden of Proof—Continued.**

was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request. *The Ferries Co. v. Brown*, 13.

Seals and Sealed Instruments.—At law, the common-law rule that an executory contract under seal can be modified or abrogated only by an instrument of equal dignity, *i. e.*, by one under seal, has not been relaxed. It is only in equity, where the distinctive equitable principles applicable in that forum may be invoked, that there has been a relaxation of such rule. *Sachs v. Owings*, 162.

REMOVAL OF CLOUD. See **JUDICIAL SALES.**

REPORT. See **MASTER IN CHANCERY.**

RESALE. See **SALES.**

RESCISSION, CANCELLATION AND REFORMATION.

Bills, Notes and Checks.—See **BILLS, NOTES AND CHECKS.**

Vendor and Purchaser.—See **VENDOR AND PURCHASER.**

RESIDENCE.

Definition.—*Cooper's Adm'r v. Commonwealth*, 338.

RES JUDICATA. See **FORMER ADJUDICATION OR RES ADJUDICATA.**

RESULTING TRUSTS. See **TRUSTS AND TRUSTEES.**

RETURN. See **EXECUTIONS; SERVICE OF PROCESS; SUMMONS AND PROCESS.**

REVIEW. See **BILL OF REVIEW.**

RIPARIAN RIGHTS. See **WATERS AND WATERCOURSES.**

ROADS. See **STREETS AND HIGHWAYS.**

SALES.

See **VENDOR AND PURCHASER.**

Acceptance of Goods.—See *infra*, "Rejection by Buyer."

Adulteration.—See *infra*, "Usages and Customs."

Evidence.—See *infra*, "Parol Evidence;" "Rejection by Buyer."

Implied Contracts.—See **IMPLIED CONTRACTS.**

Parol Evidence.—The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence. *Walker v. Gateway Milling Co.*, 217.

Rejection by Buyer.—Defendant purchased of plaintiff fifteen cars of a commodity designated in the written order therefor as "Winter Wheat Bran." Defendant refused to accept eight of the cars, contending that he was entitled to bran without screenings. It was conceded that the bran delivered by plaintiff contained a certain percentage of screenings, but plaintiff contended that, under the custom and usage of the business, the expression "Winter Wheat Bran," as understood by both parties to the contract, designated a commodity which carried such screenings as were contained in the bran shipped by it to defendant. It was held that the following considerations bearing upon the legal effect of defendant's belated refusal of a part of the bran, after using nearly half of it, were properly submitted to the jury, under correct instructions from the court, first, that in his telegram rejecting the bran, defendant did not mention screenings, and that the evidence as a whole failed to show that the presence of screenings was, in fact, the subject or cause of any fault found with the bran before it was rejected; and secondly, that there was evidence tending to show that defendant overstocked himself in anticipation of a large contract for feeding horses which he failed to get. *Walker v. Gateway Milling Co.*, 217.

Resale.—Where upon a breach of contract of sale by a purchaser, he was notified that the subject of the sale would be resold at his risk, there is no rule of law requiring that he should be given notice of the time and place of sale. *Walker v. Gateway Milling Co.*, 217.

Tax Sale.—See **TAXATION.**

Trees and Timber.—See **TREES AND TIMBER.**

SALES—Continued.

Usages and Customs.—A usage or custom of either a trade or a locality, which would otherwise form a part of a transaction will equally form a part when the transaction has been embodied in a writing unless the terms of the writing clearly exclude the usage or custom; and the application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service. *Walker v. Gateway Milling Co.*, 217.

Plaintiff sold defendant a commodity designated in the contract as "Winter Wheat Bran." In an action by plaintiff against defendant for failure to accept the bran, evidence that under the usage or custom of the trade "Winter Wheat Bran" contained a certain percentage of screenings, did not contravene the provisions of the State and Federal statutes against the adulteration and misbranding of commercial feeding stuffs, it not being claimed that the screenings in the bran constituted an unlawful adulteration, nor that the tags which were in fact placed on the sacks, indicating the presence of screenings, constituted a misbranding. There is nothing in the statutes, State or Federal, to in any way interfere with the rules of evidence in cases where parties have employed trade terms having a definite meaning, even though these statutes require that meaning to be fully defined in the stamps placed on the goods. *Walker v. Gateway Milling Co.*, 217.

The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence. *Walker v. Gateway Milling Co.*, 217.

SEALS AND SEALED INSTRUMENTS.

Release.—At law, the common-law rule that an executory contract under seal can be modified or abrogated only by an instrument of equal dignity, *i. e.*, by one under seal, has not been relaxed. It is only in equity, where the distinctive equitable principles applicable in that forum may be invoked, that there has been a relaxation of such rule. *Sachs v. Owings*, 162.

Rescission of Contract under Seal by Parol.—A mutual agreement to rescind an executory contract under seal for the sale of

SEALS AND SEALED INSTRUMENTS—Continued.**Rescission of Contract under Seal by Parol—Continued.**

land, if executed by actual cancellation or destruction of the contract, operates to annul it. But a parol executory agreement to cancel the contract could not operate, at law, to release the obligations of the contract under seal. *Sachs v. Owings*, 162.

SECONDARY EVIDENCE. See **BEST AND SECONDARY EVIDENCE.**

SECOND TRIAL. See **APPEAL AND ERROR.**

SERVANT. See **MASTER AND SERVANT.**

SERVICE OF PROCESS.

Verification.—To a return of process against non-residents was attached an affidavit of a notary to the effect that the person serving the process appeared before him in person and made oath that the statements made in the return were true. The trial court correctly ruled that such return was under oath, as required by section 3232, Code of 1904, the affidavit accompanying the return evidencing the fact. *Henry Myers & Co. v. Lewis*, 50.

SPECIFIC PERFORMANCE.

Encumbrances.—Mere knowledge of any encumbrance at the time of the contract, and the mere taking possession with such knowledge, especially where the contract provides for possession in advance of the conveyance, does not necessarily cut off a defense against the specific execution of a contract for the sale of real estate; but where the circumstances and the conduct of the parties show that the existence of an open, visible, physical encumbrance of the property must have been taken into consideration in fixing the price of the property, the purchaser can neither refuse to complete the purchase nor require an abatement of the price. This rule finds its most frequent expression in cases involving public highways, but this is due mainly to the fact that public highways are always open and visible, and the reason of the rule applies to any visible and obvious physical servitude. In such cases a covenant of general warranty is not broken by the continued adverse use of the road or right of way. *Riner v. Lester*, 563.

Infants.—An infant can compel specific performance of a contract for the conveyance of land to him, made with an adult, based on the consideration that the infant should pay all expenses

SPECIFIC PERFORMANCE—Continued.**Infants—Continued.**

of the adult at a hospital and maintain him during his natural life, which covenants the infant had performed. *Asberry v. Mitchell*, 276.

Want of mutuality is said to be the only reason assigned why a court of equity will not decree specific performance of a contract at the suit of an infant. And where at the time of the institution of the suit for specific performance, the infant has fully performed the contract on his part, there is no want of mutuality of obligation and remedy, and specific performance may be rightly decreed. *Asberry v. Mitchell*, 276.

Personal Services.—Where the consideration of a contract for the conveyance of land involves personal services to be rendered by the grantee to the grantor, a court of equity will not decree specific performance, because it cannot look after the rendition of personal services. The rule, however, is otherwise where, by the performance of the services contracted for, the contract becomes mutual in obligation and remedy. *Asberry v. Mitchell*, 276.

Sufficiency of Description of Land.—In a contract for the conveyance of land, the specific performance of which was sought by complainant, the land was described as 100 acres of land bounded by R. on the north and by M. on the south, off of the west end of the farm of the vendor. The location of the R. and M. tracts, and the western boundary of the vendor's land were well known to all the parties. As the language of the contract, giving the north and south boundary, and providing that the 100 acres be cut off of the west end of the farm of the vendor, necessarily imports that the east line must run due north and south, the land is sufficiently described in the contract to enable the court, with the aid of permissible extrinsic evidence, to locate it. *Asberry v. Mitchell*, 276.

STARE DECISIS.

Different Parties.—If the parties are different, though the question be the same, the case is controlled by the rule of *stare decisis*, and the doctrine of "the law of the case" has no application. *Steinman v. Clinchfield Coal Corp.*, 611.

Former Adjudication or Res Adjudicata.—Closely akin to the doctrine of *res judicata* is that of "the law of the case." It is sometimes treated under "*res judicata*," and sometimes under "*stare decisis*," but it occupies a distinct field of its own,

STARE DECISIS—Continued.**Former Adjudicata or Res Adjudicata**—Continued.

though it is at times confused with one or the other of the other two. *Steinman v. Clinchfield Coal Corp.*, 611.

"Law of the Case."—See "LAW OF THE CASE."

STATE CORPORATION COMMISSION. See **CORPORATIONS.****STATUTE OF FRAUDS.** See **FRAUDS, STATUTE OF.****STATUTES.**

Constitutionality.—See **CONSTITUTIONAL LAW**, and see *infra*, "Statute Adopted from Another State."

Constitutional Law.—See *infra*, "Title."

Construction.—See *infra*, "Mandatory or Permissive;" "Retrospective Construction;" "Statute Adopted from Another State."

All rules for the construction of statutes are subservient to the legislative intent; and when this is clear from the language used, rules of interpretation give way—the maxim being that it is not allowable to interpret that which has no need of interpretation. Furthermore, this intention is to be gathered from the words used unless a literal interpretation would lead to a manifest absurdity. *London Bros. v. National Exchange Bank*, 460.

Meaning of the Terms "Domicil" and "Residence."—*Cooper's Adm'r v. Commonwealth*, 338.

Domicil.—*Cooper's Adm'r v. Commonwealth*, 338.

Mandatory or Permissive.—There are many cases where "may" has been construed to mean "shall," and where a permit, in other language, has been construed into a command. There may be a duty coupled with the power, and where this is true usually the power must be exercised though conferred in merely permissive language. Permissive words are often construed as mandatory where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the powers conferred shall be exercised. *Board of Supervisors v. Cahoon*, 768.

As used in section 3577, Code of 1904, providing that on a judgment execution may issue within a year, *may* is permissive, whereas *shall* as used in section 3220 of the Code, providing that process shall be returnable within ninety days after its date, was mandatory. *Johnston v. Pearson*, 453.

The title of an act was, "An act to authorize the board of supervisors of Botetourt county to borrow \$90,000, or so

STATUTES—Continued.

Mandatory or Permissive—Continued.

much thereof as may be necessary," etc., and by the enacting clause the board was *authorized and empowered* to borrow \$90,000, or *so much thereof as may be necessary* for the purposes declared. This language is not equivocal, but is plain and unambiguous, and the circumstances of the case do not disclose any duty resting upon the board to exercise the power conferred. They were given a discretion in the matter, which they exercised when they refused to issue the bonds, and the lower court was without jurisdiction to set aside or annul their action. *Board of Supervisors v. Cahoon*, 768.

May.—*Johnston v. Pearson*, 453.

Milling Acts.—See **MILLS AND MILL DAMS**.

Permissive.—See *infra*, "Mandatory or Permissive."

Residence.—*Cooper's Adm'r v. Commonwealth*, 338.

Retroactive Construction.—Milling act forfeiture provision. *Norfolk & W. R. Co. v. Hayden*, 118.

Shall.—*Johnson v. Pearson*, 453.

Statute Adopted from Another State.—While the interpretation by the highest court of a State from which a statute is taken will be followed, the legislature cannot, by enacting a statute which has been held constitutional and valid by the highest court of another State, deprive the courts of this State of the right to determine for themselves the constitutionality of such statute. *Pine v. Commonwealth*, 812.

Title.—Code of 1904, section 1103-a, entitled: "Procedure by which unpaid subscriptions to joint stock companies may be recovered by said companies, their creditors, receivers, trustees, assignees, or any other person," is not unconstitutional, because the act deprives courts of equity of jurisdiction to determine the validity of such subscriptions, without making mention of such purpose in the title. The fact that a new procedure was to be provided by the act for the recovery of unpaid subscriptions necessarily implied that a change in existing remedies was intended. It would be impracticable to embrace in the title to such an act the various remedies, offensive and defensive, affecting subscriptions to stock. *Dickens v. Radford-Willis, etc., R. Co.*, 353.

Subsection 30 of section 1105-e, Code of 1904, as amended Acts of 1906, page 576, is not unconstitutional as violating section 52 of the Constitution, providing that no law shall

STATUTES—Continued.

Title—Continued.

embrace more than one object, which shall be expressed in its title. The act which amended subsection (30) of chapter 5 was entitled, "An act to amend and re-enact section (30) of chapter 5 of an act entitled an act concerning corporations, which became a law on the 21st of May, 1903" (Acts 1906, page 576). The title of an act amending the Code is sufficient if it refers to the chapter and sections to be amended and the body of the amendatory act is within itself germane to the subject of the chapter referred to in the title. *Jeffries v. Com.*, 425.

The purpose of section 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title, was to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the title gave no intimation. On the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. *Dickens v. Radford-Willis, etc., R. Co.*, 353.

Wherever the title of the original act sufficiently complies with section 52, Constitution of 1902, the title of subsequent amendatory acts is a matter of no consequence. *Jeffries v. Com.*, 425.

STOCK AND STOCKHOLDERS.

Actions.—See *infra*, "Subscriptions."

Equity.—See *infra*, "Subscriptions—Procedure to Recover Unpaid Subscriptions."

Remedy.—See *infra*, "Subscriptions."

Subscriptions—Procedure to Recover Unpaid Subscriptions.—Code of 1904, section 1103-a, entitled: "Procedure by which

STOCK AND STOCKHOLDERS—Continued.**Subscriptions—Procedure to Recover Unpaid Subscriptions—Continued.**

unpaid subscriptions to joint stock companies may be recovered by said companies, their creditors, receivers, trustees, assignees, or any other person," is not unconstitutional, because the act deprives courts of equity of jurisdiction to determine the validity of such subscriptions, without making mention of such purpose in the title. The fact that a new procedure was to be provided by the act for the recovery of unpaid subscriptions necessarily implied that a change in existing remedies was intended. It would be impracticable to embrace in the title to such an act the various remedies, offensive and defensive, affecting subscriptions to stock. *Dickens v. Radford-Willis, etc., R. Co., 353.*

On the trial of a motion under section 1103-a of the Code, to recover unpaid subscriptions to joint stock companies, the court on appropriate pleas, or statement in writing of grounds of defense, should submit to the jury all issues of fact involving the validity of the subscription, or other matter constituting a defense to a recovery, in order that a complete determination of the controversy may be made. *Dickens v. Radford-Willis, etc., R. Co., 353.*

Section 1103-a, Code of 1904, prescribing the procedure by which unpaid subscriptions to joint stock companies may be recovered by the companies, their creditors, etc., applies exclusively to suits or motions by the company and creditors (or subordinate claimants under the company) to recover unpaid subscriptions to the stock. In such proceeding, therefore, the stockholder must necessarily occupy the position of defendant; but the statute imposes no limitation upon the right of a stockholder who chooses to take the initiative (before suit or motion under section 1103-a has been instituted) to resort to any appropriate remedy for relief from liability on his subscription. If, however, he delays action until after suit or motion has been brought against him to recover his unpaid subscription, he cannot then by resort to equity, or otherwise, oust the exclusive jurisdiction acquired by the common law court under the statute. Nevertheless, the statute affords the stockholder an adequate and complete remedy, and clothes the common law court with exclusive jurisdiction to hear and determine all questions involving the validity of such subscription. This construction of section 1103-a, Code of 1904, leaves unimpaired the right of a stockholder proceeded against under that statute to avail of all defenses afforded by section 3299; yet, by implication, it qualifies section 3300 to the extent of deny-

STOCK AND STOCKHOLDERS—Continued.

Subscriptions—Procedure to Recover Unpaid Subscriptions—Continued.

ing to such stockholder, who has not filed a special plea of set-off, power to defeat the exclusive jurisdiction of the common law court by going into equity under that section. *Dickens v. Radford-Willis, etc., R. Co., 353.*

Unpaid Subscriptions.—See *infra*, "Subscriptions."

STREET RAILROADS.

Boarding or Alighting from Moving Car.—See *infra*, "Contributory Negligence."

Contract of Carriage.—See *infra*, "Relationship of Passenger and Carrier."

Contributory Negligence.—Boarding or Alighting from Moving Car.—It is not negligence *per se* to alight from a slowly moving street car. The same legal rule applies to the boarding of a slowly moving street car. In both cases the act of a person injured by the attempt to alight from or board a moving car would be the immediate cause of the injury. But the general doctrine of the law of negligence is that where a cause which results in injury to a person is set in motion by another, that other will be liable to the person injured, although the intervening act or omission of such person was the immediate cause of his receiving the injury, provided the circumstances surrounding him are such that his act or omission ought not to be imputed to him as a fault, *i. e.*, where the latter act or omission occurs in the exercise of ordinary care by the person injured. That is to say, the general doctrine of the law of negligence is, that the act or omission of the person injured, if it occurs in the exercise of ordinary care on the part of the latter, cannot be regarded as the proximate cause of the injury. Certainly this doctrine is applicable to the conduct of passengers boarding or alighting from slowly moving street railway cars under the rule above mentioned. Under it, where the car being in motion is due to the negligence of another and contact with it causes the injury, the question of fact is, whether the act of the person injured, in attempting to board a slowly moving car, was one of ordinary care. If so, such act cannot be considered as the proximate cause of the injury. *Virginia Ry., etc., Co. v. Arnold, 204.*

Implied Contracts.—See *infra*, "Relationship of Passenger and Carrier."

Last Clear Chance.—See **LAST CLEAR CHANCE.**

Proximate Cause.—See *infra*, "Contributory Negligence."

Relationship of Passenger and Carrier.—In a case where the servant of the defendant in charge of the movement of the car

STREET RAILROADS—Continued.**Relationship of Passenger and Carrier—Continued.**

does not in fact see the intending passenger, and is not in fact aware that he wishes to become a passenger, the situation must be such that in the exercise of ordinary care in the discharge of its duty as a common carrier the defendant through such employee ought to have seen him or have been aware that he wished to become a passenger, before the law will imply the contract of carriage. *Virginia Ry., etc., Co. v. Arnold*, 204.

The act of a carrier in stopping a street car, or in bringing it almost to a stop at a place where it is accustomed to receive or discharge passengers, is an implied invitation by the carrier to a would-be passenger to get aboard, regardless of the motive or mental attitude of the employee controlling the movement of the car, and an acceptance by a would-be passenger of this implied invitation, creates the relationship of carrier and passenger. The law under such circumstances implies the contract of carriage. *Virginia Ry., etc., Co. v. Arnold*, 204.

The conscious acceptance by the motorman or conductor of a car of the offer of a would-be passenger to become a passenger—i. e., the actual meeting of minds of passenger and carrier in fact upon a contract of carriage—is not essential to the relationship of carrier and passenger. *Virginia Ry., etc., Co. v. Arnold*, 204.

The relation of passenger and carrier is one of contract. It differs, however, from a contract in the ordinary relations of parties to each other, in that it is a contract which a common carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirements entitling him to ask of it the service of carriage and he does in fact ask it. The law in such case imposes the duty upon the carrier to render the service, and, under proper circumstances, the law will imply the existence of a contract of carriage. *Virginia Ry., etc., Co. v. Arnold*, 204.

STREETS AND HIGHWAYS.

Abutting Owners.—Ascertainment of damages to abutting owners. See *infra*, "Changing Grade."

Acceptance.—Necessity for. *Washington-Va. Ry. Co. v. Fisher*, 229.

Automobiles.—See AUTOMOBILES.

Bond of Contractor.—See *infra*, "Multifariousness."

Whether or not a bond should be required of the contractors for the grading of a street in the first instance is a

STREETS AND HIGHWAYS—Continued.**Bond of Contractor—Continued.**

matter resting entirely within the discretion of the council, and whether, if required, it should thereafter be waived rests equally within their discretion, and is not a matter of which a citizen could complain merely because in its absence a forfeiture could not probably be enforced. *Appalachia v. Mainous*, 666.

Changing Grade.—Ascertainment of Damages to Abutting Owners.—A decree of court requiring the council of a town to ascertain the damages, if any, which may accrue to the complainant by reason of the change of grade of the street in front of his property, and to proceed with all due diligence to grade and fill in the street fronting complainant's property in accordance with grades established by the town and shown by the report of its engineer, and further requiring the town to construct and complete a concrete sidewalk fronting complainant's property in accordance with established grades and in conformity to concrete sidewalks heretofore constructed on said street, is plainly erroneous, as it infringes upon the discretionary powers of the council. *Appalachia v. Mainous*, 666.

The statute relating to the change of grade of a street in a town requires the town to give the abutting owner at least ten days' notice of a time and place to be designated in the notice, to show cause, if any he can, against the ascertainment of damages fixed by the committee to ascertain the same. It then provides: "Any one wishing to make objection to such ascertainment, so far as the same affects him, may appear in person or by counsel and state his objections. If his objections are overruled, he may within ten days thereafter, but not afterwards, have an appeal as of right * * * to the circuit court of the county in which said town is situated." It is further provided that the hearing on the appeal shall be *de novo*. Acts 1912, clause 160, page 354. Held: That where the owner's objections were never overruled as required by the statute, all proceedings based on the report of the committee of which the owner had neither notice nor knowledge until too late to appeal were null and void. *Appalachia v. Mainous*, 666.

County Road or Highway.—The word "county," as used in section 1294-d, clauses 38 and 39, Code of 1904, setting forth the duty of a railroad, crossing a "county road or highway," is used in the sense of an adjective and modifies or limits both "road" and "highway;" and from their collocation those words are the equivalent of "county road or county high-

STREETS AND HIGHWAYS—Continued.**County Road or Highway—Continued.**

way;" and a road dedicated by a plat to the public, but never accepted as such by the county authorities, is not a "county road or highway," as those terms are used in the statute. Washington-Va. Ry. Co. v. Fisher, 229.

County Roads or Highways.—Acceptance. Washington-Va. Ry. Co. v. Fisher, 229.

Crossings.—See CROSSINGS.

Damages.—Ascertainment of Damages to Abutting Owners.—See *infra*, "Changing Grade."

Grading and Paving Streets.—Discretion of Council.—It is for the council of a municipality to determine in the first instance, what streets it will grade or pave, and what shall be the character of the grading or paving. In matters of this character, the decision of the council is, in the absence of fraud, final and conclusive, and cannot be controlled by the courts, unless the council transcends its powers. *Appalachia v. Mainous*, 666.

Map.—See *infra*, "Sale of Lot with Reference to Map or Plat."

Multifariousness.—Complainant in a bill in equity sought to redress a wrong done him as an individual, by the grading of a street in front of his premises, and also an injury to him as a citizen of a municipality, in that the bond required of the contractor for the grading had not been given and that a member of the street committee who was charged with the duty of assessing the damage to his property had an interest in the contract for doing the grading. As a waiver of the contractor's bond was within the discretion of the town council and not a matter of which a citizen could complain, the bill was not multifarious. The mere assertion of a right which the court will not enforce will not render a bill multifarious. The right sought to be enforced was within the discretionary powers of the council, with which the courts will not interfere, and the allegation that a member of the street committee was interested in the contract for grading is a mere incident of the gravamen of the bill and does not render the bill multifarious. As regards multifariousness, each case must be decided on its own facts. *Appalachia v. Mainous*, 666.

Plat.—See *infra*, "Sale of Lot with Reference to Map or Plat."

Sale of Lot with Reference to Map or Plat.—Upon the acknowledgment and recordation of a plat, the "Map Act" (Code 1904, section 2510-a), creates a public easement or right of passage over such portions of the premises as are set apart for streets; yet such streets do not become "county roads or

STREETS AND HIGHWAYS—Continued.**Sale of Lot with Reference to Map or Plat—Continued.**

highways" unless and until they are accepted or established as such by the county authorities. It affirmatively appears that in the instant case the street in question has never been so accepted or established. Consequently, it is not "a county road or highway" in contemplation of clauses 38 and 39 of section 1294-d of Code of 1904. *Washington-Va. Ry. Co. v. Fisher*, 229.

Taxation.—See TAXATION.

STRIKING FROM DOCKET. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

SUBMISSION. See ARBITRATION AND AWARD.

SUBSCRIPTIONS. See STOCK AND STOCKHOLDERS.

SUCCESSIVE TRIALS. See APPEAL AND ERROR.

SUMMONS AND PROCESS. See SERVICE OF PROCESS.

Executions.—See EXECUTIONS.

Mandamus.—The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary. *Moorman v. Campbell County*, 112.

Return.—As used in section 3577, Code of 1904, providing that on a judgment execution may issue within a year, *may* is permissive, whereas *shall* as used in section 3220 of the Code, providing that process shall be returnable within ninety days after its date, was mandatory. *Johnston v. Pearson*, 453.

The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary. *Moorman v. Campbell County*, 112.

Section 3220 of the Code of 1902 provides that process, whether original, mesne or final, shall be returnable within ninety days after its date, and that process shall be issued before the rule day to which it is returnable, but may be executed on or before that date. All three kinds of process are embraced in the same class and put upon exactly the

SUMMONS AND PROCESS—Continued.**Return—Continued.**

same footing, and, it having been determined that original and mesne process returnable more than ninety days after its date is void, final process, or process of execution, must share the same fate. *Johnston v. Pearson*, 453.

Verification.—See SERVICE OF PROCESS.

Waiver.—The doctrine of waiver has no application to a void process. *Johnston v. Pearson*, 453.

SUPERSEDEAS. See **APPEAL AND ERROR.**

SUPERSEDING CAUSE. See **NEGLIGENCE.**

SURETYSHIP.**Lien.**—See *infra*, "Release."

Release of Surety.—A surety is entitled to be relieved from his liability to pay the debt of his principal, either in whole or in part as the case may be, if the creditor, without the consent of the surety, releases any lien which he may have on any property of the principal as security for the debt, and it is the duty of a creditor holding collateral securities to preserve them and be ready to surrender them to the debtor when he demands payment of the debt. But in the instant case the evidence utterly failed to show that the creditor ever had possession or control of any collateral security for the debt involved or released any lien thereon. *Triplett v. Second National Bank*, 189.

TAXATION.**Assessment.**—See *infra*, "Tax Sale."

Assessment against former owner after sale to Commonwealth. *Zimmerman Co. v. Dey*, 709.

Change of Domicil.—Residence, with no present intention of removal, constitutes domicil. Mere change of place is not change of domicil. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. To constitute a new domicil two things must concur—first, residence in the new locality; second, the intention to remain there. Until the new domicil is acquired, the old one remains and whenever a change of domicil is alleged, the burden rests upon the party alleging it. *Cooper's Adm'r v. Commonwealth*, 338.

TAXATION—Continued.

Constitutional Law.—*Uniformity.*—The Code of 1904, section 944-a, clause 11, as amended by act of March 15, 1915, page 121, which provides that the board of supervisors of each county shall annually levy a road tax upon the property, subject to local taxation in their county and not within the corporate limits of any town in such county which maintains its own streets, is not in violation of section 168 of the Constitution, which provides that "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." *Watkins v. Barrow*, 236.

The "territorial limits of the authority levying the tax," within which the taxes, under section 168 of the Constitution of 1902, must be uniform, corresponds with the taxing districts lawfully prescribed for the peculiar benefit of which such taxes are levied and collected. Thus, while the board of supervisors has authority to impose county levies for county purposes upon all property located in the county, still under the Constitution itself (section 111) the territorial limit of its authority to levy uniform district taxes is confined to the limits of the particular magisterial district for the benefit of which the taxes are imposed, and they may and do levy varying rates in different districts in the same county. *Watkins v. Barrow*, 236.

County Levy.—See *infra*, "Constitutional Law."

The words "county levy," as generally used in this State, mean the tax levied upon the property of the taxpayers of the county for the purpose of paying the general county expenses, such as the salaries of county officials, the maintenance of courthouses, and those general expenses by which all of the citizens of the county are benefited, whether they live in an incorporated town constituting a part of the county or outside of such town. And the county levy is to be distinguished from other special taxes levied by the board of supervisors for particular purposes. *Watkins v. Barrow*, 236.

Deed.—See *infra*, "Tax Deed;" "Variance."

Domicil and Residence.—See *infra*, "Change of Domicil."

As used in the Virginia statutes (Code, sections 491 and 494, as amended Acts, 1915, page 219), so far as they relate to taxes upon intangible property, having no other *situs* for taxation, the words "residing therein" and the words "resid-

TAXATION—Continued.

Domicil and Residence—Continued.

ing * * * in his district" can only refer to persons domiciled in the district of the local commissioner of the revenue who makes the assessment, for any other construction would inevitably lead to hopeless confusion and conflict between the different communities in this and in other States, in which the taxpayer might have temporary residences, as well as to multiplied taxation upon the same property. *Cooper's Adm'r v. Commonwealth*, 338.

In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicil, and must be generally, if not universally, supported by the oath of the voter. *Cooper's Adm'r v. Commonwealth*, 338.

It being established that from his childhood to 1905 a person's domicil was in another State, the burden is upon those who allege change of domicil to establish it. *Cooper's Adm'r v. Commonwealth*, 338.

Notwithstanding that a party had lived for seven years in Salem, Virginia; that he had built and, with his family, occupied a handsome dwelling in that town; that he had been an officer and stockholder in a number of Virginia corporations; that in applications for life insurance policies and in certificates to procure charters for corporations, he had stated his residence to be in Salem; that he had become president of the board of trade of Salem; that he had transferred his church membership to a church in Salem; that his children went to the public schools of Salem without the payment of fees required of non-residents, though there was no evidence that he had ever been asked or refused to pay such fees; and that he had purchased burial lots in a cemetery in Salem and removed the bodies of two of his dead children and interred them in these lots; his domicil was in West Virginia, where he had resided prior to his removal to Salem; where the evidence showed that when the subject was discussed, he plainly made it evident that he did not intend to give up his legal domicil in West Virginia; that his chief business and largest property interests were there; that he was postmaster there and apparently desired to continue to hold that office, which he felt he could not do if he changed his domicil; that when asked by the commissioner of revenue of Salem to list his intangible property, he refused to do so and distinctly tendered the issue of fact which is involved to the commissioner of the revenue; that it was his custom to go to West Virginia and remain two or three days, every ten days

TAXATION—Continued.

Domicil and Residence—Continued.

or two weeks, for the purpose of attending to his business; that he paid his poll tax annually in West Virginia, and voted regularly in that State. *Cooper's Adm'r v. Commonwealth*, 338.

Though frequently so used, "residence" and "domicil" are not synonymous words and *domicil* has the larger significance. The meaning of the word *residence* depends upon the subject matter and connection in which it is used. In general terms it may be said to be the dwelling place of a person, but it may be either his permanent or temporary abode. In the construction of statutes, the meaning of the word *residence* depends upon the context and purpose of the statute. As used in one statute it may clearly refer to a mere business residence, while as used in another it may just as clearly refer to domicil as technically and strictly defined. In determining the meaning of the word in a particular statute, the legislative purpose and the context must be always kept in view. *Cooper's Adm'r v. Commonwealth*, 338.

Payment.—See *infra*, "Recovery of Taxes Paid."

Privileged Communications.—See WITNESSES.

Recovery of Taxes.—At common law, taxes illegally assessed but voluntarily paid cannot be recovered. *Barrow v. Prince Edward County*, 1.

The Virginia Statute, sections 567 to 571, of the Code of 1904, provides a simple, expeditious, and inexpensive remedy at law by motion, whereby taxes erroneously assessed and collected may be recovered within two years from the first day of September of the year in which the assessment is made, even though voluntarily paid. Therefore, a bill in equity does not lie in such a case. *Barrow v. Prince Edward County*, 1.

Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, as to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary. *Barrow v. Prince Edward County*, 1.

Redemption.—Compliance with statute.—*Zimmerman Co. v. Dey*, 709.

TAXATION—Continued.

Residence.— See *infra*, "Domicil and Residence."

Road Tax.—The Code of 1904, section 944-a, clause 11, as amended by act of March 15, 1915, page 121, which provides that the board of supervisors of each county shall annually levy a road tax upon the property, subject to local taxation in their county and not within the corporate limits of any town in such county which maintains its own streets, is not in violation of section 168 of the Constitution, which provides that "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." *Watkins v. Barrow*, 236.

Sale.— See *infra*, "Tax Sale."

Tax Deed.—*Validity—Compliance with Section 666, Code of 1904—Case at Bar.*—Suit was brought to annul a tax deed upon the ground that the purchaser was not required to comply with section 666, Code of 1904, by paying to the clerk "the amount for which the sale to the Commonwealth was made and the taxes and county levies to the city, town or county or district in which the land is situated, together with such additional sums as would have accrued from taxes, levies and interest if such real estate had not been so purchased by the Commonwealth, etc." The particulars in which it was charged that this provision of the statute was ignored are, (1) that the purchaser was not required to pay anything on account of the years in which, after the sale to the Commonwealth, the former owner himself paid the taxes assessed against him, and (2) that the purchaser did not pay the clerk, before obtaining his deed and within the time required by the statute, the city taxes for 1907, and the city and State taxes for 1908, both of which had accrued before his purchase and which he afterwards paid, not to the clerk, but to the city collector and the city treasurer, respectively, of the city of Roanoke. Held: That these objections were both good because they were based upon a disregard by the purchaser and the clerk of vital and indispensable requirements of section 666 of the Code of 1904. *Zimmerman Co. v. Dey*, 709.

Validity—Sections 661 and 666, Code of 1904.—In order to invoke and be entitled to the benefit of section 661, Code of 1904, he who has acquired a tax title, such as the one involved in the instant case, must have acquired it in accordance with the requirements of section 666; that is, section

TAXATION—Continued.**Tax Deed—Continued.**

Validity—Sections 661 and 666, Code of 1904—Continued.
661 was not intended to make a tax title good unless it has been acquired as the statute says, "in pursuance of section 666." *Zimmerman Co. v. Dey*, 709.

Tax Sale.—See *infra*, "Tax Deed."

Sale to the Commonwealth—Redemption—Purchase from the Commonwealth.—Where land is sold to the Commonwealth for delinquent taxes it is thereafter to be carried on the land books, as required by section 469 of the Code of 1904, in the name of the former owner, but with a notation of the sale to indicate its status. When a former owner redeems, or a third person purchases, he will be required to pay to the clerk, along with certain fees and penalties, such sums as would have accrued for taxes if no sale to the Commonwealth had been made. If after the sale to the Commonwealth the land by apparently regular proceedings is assessed against the former owner and the taxes paid by him, it would be just, whether strictly according to law or not, for him to be given credit for such payments when he undertakes to redeem. But there is no reason why a third person, who purchases the land from the Commonwealth, should be permitted to appropriate to his benefit such payments by the former owner, and the statute prevents him from so doing. In such case the purchaser under section 666, Code of 1904, must pay the taxes for the intervening years between the purchase by the Commonwealth and his own purchase, whether paid by the former owner or not. *Zimmerman Co. v. Dey*, 709.

Title in Commonwealth—Assessment Against Former Owner.—When a sale is made to the Commonwealth for delinquent taxes, as in this case, the title thereafter remains in the Commonwealth until it is divested by a redemption or a purchase in the manner prescribed by law. Until one of these events takes place, there can be, properly speaking, no further assessment of the property against the former owner for taxation, for the plain reason that the property belongs to the State. *Zimmerman Co. v. Dey*, 709.

Title in Commonwealth.—See *infra*, "Tax Sale."

Uniformity.—See *infra*, "Constitutional Law."

Variance.—Suit to Annul Tax Deed.—There is no rule of pleading or any reason or authority that denies one litigant the benefit of a fact germane to the gist of his suit or action,

TAXATION—Continued.**Variance—Continued.**

even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the case. *Zimmerman Co. v. Dey*, 709.

Where the gravamen of a bill was that the defendant obtained a tax deed without complying with the statutory requirements in the matter of his payments to the clerk, and facts were offered in evidence which tended to support the fundamental charges and general purposes and prayer of the bill, but which were at variance with specific averments therein, the proper way to take advantage of the variance would have been to object to the evidence. This would have given the complainant an opportunity to amend the pleadings and would have worked prejudice to neither party. *Zimmerman Co. v. Dey*, 709.

Voluntary Payment.—See *infra*, "Recovery of Taxes Paid."

TENANCY FROM YEAR TO YEAR. See **LANDLORD AND TENANT.**

TENANT. See **LANDLORD AND TENANT.**

TENANTS IN COMMON. See **JOINT TENANTS AND TENANTS IN COMMON.**

TESTAMENTARY CAPACITY. See **WILLS.**

TICKETS AND FARES. See **CARRIERS.**

TIMBER. See **TREES AND TIMBER.**

TIME.

Time as essence of a contract of sale. *Sachs v. Owings*, 162.

TIME LIMIT. See **CARRIERS.**

TITLE. See **STATUTES; VENDOR AND PURCHASER.**

Common Source of Title.—See **EJECTMENT.**

TITLE BOND. See **VENDOR AND PURCHASER.**

TREES AND TIMBER.

Damages.—See *infra*, "Reservation of Tan Bark."

A trespass committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, is not willful, and where, in the instant case, defendant cut the standing trees of plaintiffs under a *bona fide* claim of right, an instruction that the plaintiffs were not confined to compensatory damages, but were entitled to recover also the value added to the trees by the labor of defendant in manufacturing them into lumber, was error. *Wood and Others v. Weaver*, 250.

In an action for damages for cutting and converting trees in all cases where the trespass is not willful, the damages are compensatory and the stumpage value of the trees, *i. e.*, the value of the trees as they stood immediately before they were severed from the land, is the measure of compensatory damages in such an action. The owner of the chattel is not allowed in such case to recover the added value due to the labor of the non-willful trespasser, because of the recognition, even in courts of law, of an equitable and quasi property right acquired by one who adds value to property by his labor, although the property upon which it is expended may be the property of another, the labor being bestowed in a *bona fide* belief of a right to bestow it. *Wood and Others v. Weaver*, 250.

Where a landowner sells his timber and receives the purchase price therefor in full, upon condition that the timber is to be severed and removed within a limited time, then all such timber or logs, although paid for, which remain upon the property at the end of the time limited, revert to the owner of the land, and the lumberman cannot recover such timber or lumber, or the value thereof. *McCorkle & Son v. Kincaid*, 546.

Where a landowner sells his timber but does not receive the purchase price therefor in full, and timber covered by the contract is left growing, and logs left in the woods which should have been taken out, nevertheless the landowner cannot recover for the contract value of this timber and these logs because they remained his property and were still in his possession, and if they were utilized or by reasonable diligence could have been utilized by him, any amounts realized, or which could have been thus realized, therefrom should be set off against the damage which the jury might find in favor of the landowner. *McCorkle & Son v. Kincaid*, 546.

TREES AND TIMBER—Continued.

Damages—Continued.

Where the trespass is not willful, the defendant may, even at law, in an action against him by the owner of the chattel for the conversion of it, adduce proof of value added to the chattel by his labor in mitigation of damages. But where the defendant is a willful trespasser the case is otherwise, and the plaintiff in his recovery of damages obtains the benefit of the value to the chattel by the labor of the wrong doer, not upon the principle upon which punitive or exemplary damages are imposed, but as the necessary result of the defendant's having deprived himself, by his wrong doing, of the right to interpose the defense under consideration in mitigation of damages. *Wood and Others v. Weaver*, 250.

Detinue.—See *infra*, "Election of Remedies."

Election of Remedies.—Every trespass consisting in the cutting of standing trees is in its nature an injury to real estate and the owner, besides his remedies in equity in proper cases, has the election to so treat the trespass and bring his action for damages to the market value of the land (where he is the owner of the land) or to the market value of the standing trees, if he owns only the latter. In such case the common law action of trespass *quare clausum fregit*, or (under statute, section 2901, Code of 1904) the same action on the case, is an appropriate remedy at law. The damages to the real estate may, however, be waived by the owner by his election to bring an action at law for the trees themselves, severed from the land, or for their value, as having been converted into some form of personal property. In this State, in the former case, detinue is the proper remedy, and, in the latter case, trover (the gist of which is the conversion), or a like action of trespass on the case for the conversion of the trees. *Wood and Others v. Weaver*, 250.

Lumber Used in Buildings.—A contract for the sale of growing timber provided that the lumbermen should have the right to erect on the premises necessary buildings for the manufacture of the timber, the buildings to revert to the landowner when the lumbermen had finished the manufacture and removal of the timber, and the amount of lumber used in the construction of the buildings to be deducted from the amount of timber measured during the current month. The words in the contract "amount of lumber" and "amount of timber" are to be construed to refer both to quantity and value, and where inferior timber is used in the construc-

TREES AND TIMBER—Continued.**Lumber Used in Buildings—Continued.**

tion of the buildings, only the actual value thereof should be deducted and not the average value paid by the lumbermen for all the logs. *McCorkle & Son v. Kincaid*, 546.

Platforms or docks running out on a level with the mill floor upon which the lumber is taken on cars and stacked for the purpose of drying, are not buildings within the meaning of the contract referred to in the preceding syllabus, and hence the logs from which the lumber was made out of which they were constructed should be paid for. *McCorkle & Son v. Kincaid*, 546.

Merchantable Timber.—A contract for the sale of growing timber provided that the timber was to be of sound, merchantable quality. Within the meaning of this contract, sound, merchantable logs are logs that have a commercial value for manufacture into lumber and such as were ordinarily used for that purpose in that locality. What is merchantable in one locality may be unmerchantable in another locality, and it is error to instruct the jury that the test of whether a log has a merchantable value is that "when cut into lumber, it produced all or any of the grades of lumber known and recognized as merchantable lumber in the lumber markets." *McCorkle & Son v. Kincaid*, 546.

Reservation of Tan Bark—*Mensure of Damages.*—A contract for the sale of growing timber gave the lumbermen two years from the date thereof within which to manufacture and remove the timber. The contract reserved to the landowners the tan bark on certain trees, which trees were to be felled and peeled by the landowners at such time "during the peeling seasons" as would not be inconvenient to the lumbermen for the manufacture of the trees. It appeared that the tan bark could only be conveniently and profitably taken from the trees during the months of April, May and June. Upon a fair construction of this contract, the landowners were to have at least two tan bark seasons in which to secure the tan bark, and the lumbermen violated the contract by felling the trees in question before the second tan bark season began. As the lumbermen were to have two years in which to perform their contract, so the landowners were also to have a reasonable time in which to secure the tan bark. That reasonable time is not only indicated by the two years fixed for the benefit of the lumbermen, but also by the use of the plural "seasons" in the contract. The landowners were entitled to recover as damages the fair value of the tan bark of which they were deprived. *McCorkle & Son v. Kincaid*, 546.

TREES AND TIMBER—Continued.

Sale.—See *infra*, "Lumber Used in Buildings;" "Merchantable Timber;" "Reservation of Tan Bark."

Damages.—See *infra*, "Damages."

Trespass.—See *infra*, "Election of Remedies." "Wilful Trespass."

Damages.—See *infra*, "Damages."

Trover and Conversion.—See *infra*, "Damages;" "Election of Remedies."

Willful Trespass.—A trespass committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, is not willful, and where, in the instant case, defendant cut the standing trees of plaintiffs under a *bona fide* claim of right, an instruction that the plaintiffs were not confined to compensatory damages, but were entitled to recover also the value added to the trees by the labor of defendant in manufacturing them into lumber, was error. *Wood and Others v. Weaver*, 250.

Every trespass is *prima facie* willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appear from the evidence for the plaintiff, to show that the trespass was not willful. *Wood and Others v. Weaver*, 250.

"Willful," in its connection with trespass, is not confined in its meaning to the act of trespass itself, in the sense that such act itself is intentionally or knowingly done. In that sense every trespass would be willful. The legal meaning of the word "willful" in this connection is a technical one, which the courts and text writers have found it impossible to define in set terms which will fit every case. To be willful the act of trespass itself must be intentional, to be sure, for if done accidentally or by inadvertance or by mistake not induced by gross negligence, it will not be willful. A criminal intent is not essential, nor even a fraudulent intent. The act need not rise above the degree of gross negligence of the property rights of others to constitute the trespass a willful trespass. The act which constitutes a willful trespass may be anywhere in the domain of the law which extends from the region of felonies down to gross negligence, but is never found below the border line of the latter, in the region of mere negligence. *Wood and Others v. Weaver*, 250.

TRESPASS.

Cutting Trees.—See TREES AND TIMBER.

Damages.—See TREES AND TIMBER.

TRESPASS—Continued.

Presumptions and Burden of Proof.—See *infra*, "Willful Trespass."

Every trespass is *prima facie* willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appear from the evidence for the plaintiff, to show that the trespass was not willful. *Wood and Others v. Weaver*, 250.

Trees and Timber.—See **TREES AND TIMBER**.

Willful Trespass.—A trespass committed under a *bona fide* claim of right; or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, is not willful, and where, in the instant case, defendant cut the standing trees of plaintiffs under a *bona fide* claim of right, an instruction that the plaintiffs were not confined to compensatory damages, but were entitled to recover also the value added to the trees by the labor of defendant in manufacturing them into lumber, was error. *Wood and Others v. Weaver*, 250.

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TRIAL.

Demurrer to the Evidence.—See DEMURRER TO THE EVIDENCE.

Second Trial.—See APPEAL AND ERROR.

TROVER AND CONVERSION.

Trees and Timber.—See TREES AND TIMBER.

TRUSTS AND TRUSTEES.

Acknowledgments.—See ACKNOWLEDGMENTS.

Agency.—An agent may not purchase land in his own name for the benefit of his principal and then refuse to convey the same in accordance with his contract, but in such case will be held as a constructive trustee. *Matney v. Yates*, 506.

Where a principal, having no interest in the land to be purchased, makes a verbal contract with an agent to buy for him, and the latter purchases in his own name and with his own funds and then repudiates the agency and refuses to convey to the principal, the question whether the contract is within the statute of frauds and not enforceable against the agent, depends upon whether the contract in its essence and effect was one of agency, or was it one for the purchase of real estate. If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof. *Matney v. Yates*, 506.

Where it is sought to establish that an agent to purchase land is a constructive trustee of his principal, the relationship of principal and agent should be established by clear and convincing proof. *Matney v. Yates*, 506.

Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money. *Matney v. Yates*, 506.

Bill of Conformity.—See *infra*, "Resort to Court for Direction and Advice."

Consideration.—See *infra*, "Parol Trust."

A voluntary trust is an equitable gift *inter vivos*, and needs no consideration moving from the *cestui que trust* to

TRUSTS AND TRUSTEES—Continued.**Consideration—Continued.**

support it. And it is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it. *Fleenor v. Hensley*, 367.

Constructive Trusts.—See *infra*, "Agency."

Creation.—An express trust in real estate may be created by parol, but the declaration must be unequivocal and explicit and established by clear and convincing testimony. *Fleenor v. Hensley*, 367.

Equity.—See *infra*, "Fraud and Deceit." "Resort to Court for Direction and Advice."

Establishment.—A bill that alleges that complainants are claiming the ownership of a tract of land as successors in title of the original owners, whom they have succeeded in possession of the land, shows a substantial and sufficient interest in the land in controversy, in a suit to establish a constructive trust in defendant for the benefit of complainants. *Matney v. Yates*, 506.

Fraud and Deceit.—A court of equity will not enforce a trust created for an illegal or fraudulent purpose. *Fleenor v. Hensley*, 367.

In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

Frauds, Statute of.—Where a principal, having no interest in the land to be purchased, makes a verbal contract with an agent to buy for him, and the latter purchases in his own name and with his own funds and then repudiates the agency and refuses to convey to the principal, the question whether the contract is within the statute of frauds and not enforceable against the agent, depends upon whether the contract in its essence and effect was one of agency, or was it one for the purchase of real estate. If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof. *Matney v. Yates*, 506.

TRUSTS AND TRUSTEES—Continued.

Frauds, Statute of—Continued.

Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money. *Matney v. Yates*, 506.

Interest of Complainant.—A bill that alleges that complainants are claiming the ownership of a tract of land as successors in title of the original owners, whom they have succeeded in possession of the land, shows a substantial and sufficient interest in the land in controversy, in a suit to establish a constructive trust in defendant for the benefit of complainants. *Matney v. Yates*, 506.

Issue Not Made by the Pleadings.—In a suit in equity to enforce against defendant an express trust created by parol agreement, in a certain tract of land, defendant contended that the trust was created for a fraudulent purpose, namely, to shield from his creditors the consideration furnished by a son of the complainant. Held: Although the evidence in the cause pointed very strongly toward that conclusion, yet as the issue was not made by the pleadings in the cause, this defense was not available to defendant. *Fleenor v. Hensley*, 367.

Jurisdiction of Equity.—See *infra*, "Resort to Court for Direction and Advice."

Parol Trust.—See *infra*, "Creation."

On principle, it is immaterial from whom the consideration is derived to support an express trust. In this particular an express trust created by parol, cannot differ from such a trust created by writing. The consideration may move from any donor of it for the benefit of a *cestui que trust* other than the donor. It need not move from the *cestui que trust*, and usually does not. All persons who have the capacity to hold and dispose of property can impress a trust upon it. If a trust has been completely declared, the absence of a valuable consideration (moving from the *cestui que trust*) is entirely immaterial. *Fleenor v. Hensley*, 367.

Resort to Court for Direction and Advice.—A bill of conformity filed by the curator of an estate, praying the instruction and guidance of the court in the discharge of its duties as

TRUSTS AND TRUSTEES—Continued.**Resort to Court for Direction and Advice—Continued.**

curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges cannot be safely disposed of except by the direction of the court, in nowise contravenes a supersedeas order in a collateral suit involving the estate. The object of the bill is to preserve the property of the estate pending litigation for whomsoever shall ultimately be adjudged the rightful owner. Such is the common practice with trial courts in this jurisdiction. *Gooch v. Old Dominion Trust Co.*, 29.

As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealings with the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they are entitled to direction and instruction from the court. Whenever a case occurs which justifies the proceedings, trustees, by bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event. *Gooch v. Old Dominion Trust Co.*, 29.

Resulting Trusts.—See *infra*, "Agency."**Suit to Enforce an Express Trust.—See *infra*, "Fraud and Deceit."**

In a suit in equity to enforce an express trust created by parol agreement in a certain tract of land, it appeared from the evidence that defendant accepted the trust for complainant and another; that complainant's interest at that time was not undivided, but a specific part of the land set apart to her by partition; that this was known to defendant at the time he accepted the trust; that such specific portion of land belonging to complainant was reduced by the sale and conveyance, to the specific parcel of land claimed by her in her bill. Held: That complainant was entitled to a decree against defendant for a conveyance of such specific parcel of land, and not, as contended by defendant, to an undivided interest in the land. *Fleener v. Hensley*, 367.

UNDUE INFLUENCE.

Wills.—Facts held not to constitute undue influence. *Wohlford v. Wohlford*, 699.

USAGES AND CUSTOMS. See **SALES.**

Appeal and Error.—Defendant contended that he had no actual knowledge of the custom or usage of the trade in question, and that it was not sufficiently certain and notorious to give rise to a presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal. *Walker v. Gateway Milling Co.*, 217.

Contracts.—A usage or custom of either a trade or a locality, which would otherwise form a part of a transaction will equally form a part when the transaction has been embodied in a writing unless the terms of the writing clearly exclude the usage or custom; and the application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service. *Walker v. Gateway Milling Co.*, 217.

Evidence.—See *infra*, "Parol Evidence."

Interpretation and Construction.—See *infra*, "Parol Evidence."

Parol Evidence.—The words of a contract are to be understood in their ordinary and proper sense unless by usage of trade or otherwise they have, in respect to the subject matter, acquired a peculiar meaning; and such meaning is not clearly inconsistent with the terms of the contract. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence. *Walker v. Gateway Milling Co.*, 217.

Tickets and Fares.—Custom and usage may have an important bearing on whether stipulations on a ticket may, in particular cases, constitute a contract, as well as at the same time serve in part the primary function of a ticket. *Louisville & Nashville R. Co. v. Rieley*, 469.

VACATION. See **CHAMBERS AND VACATION.****VARIANCE.**

Agreed Statement of Facts.—There is no rule of pleading or any reason or authority that denies one litigant the benefit of a fact germane to the gist of his suit or action, even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the case. *Zimmerman Co. v. Dey*, 709.

VARIANCE—Continued.

Bill in Equity.—*Suit to Annul Tax Deed.*—There is no rule of pleading or any reason or authority that denies one litigant the benefit of a fact germane to the gist of his suit or action, even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the case. *Zimmerman Co. v. Dey*, 709.

Where the gravamen of a bill was that the defendant obtained a tax deed without complying with the statutory requirements in the matter of his payments to the clerk, and facts were offered in evidence which tended to support the fundamental charges and general purposes and prayer of the bill, but which were at variance with specific averments therein, the proper way to take advantage of the variance would have been to object to the evidence. This would have given the complainant an opportunity to amend the pleadings and would have worked prejudice to neither party. *Zimmerman Co. v. Dey*, 709.

VENDOR AND PURCHASER. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Agency.—Appellant effected a sale of timber on land which he owned in common with others, and at the same time released to the purchasers a claim for an undivided interest in the land. It appeared from the evidence that the vendee would not have purchased the timber without the inclusion of appellant's claim of title in the sale of it. The title claimed by appellant was not proved to be a valid claim, but it constituted a cloud upon the title and its extinguishment was of value to the vendee of the timber. Held: That the burden of proof was upon the appellant to show by a preponderance of evidence that the cloud upon the title to the timber had some definite value, and the appellant having sustained the burden of proof which rested upon him by proving in a satisfactory way a definite selling value of such cloud upon the title at the time of the sale of the timber, was entitled to a part of the purchase price as compensation for the release of his claim. *Harman v. Moss*, 399.

Appellant effected a sale of the timber upon a tract of land, of which he was part owner, in common with appellees and others, under a certain agreement or option by which was granted to the appellant the right of buying or selling the timber on the land at \$10.00 per acre. Appellant did not undertake the sale as an ordinary real estate agent or

VENDOR AND PURCHASER—Continued.

Agency—Continued.

broker. The sale was of a special character and appellant's situation and qualifications for making the sale were exceptional, and the benefits flowing to appellees as the result of a very advantageous sale were peculiar. Therefore, appellant's compensation for making the sale of the timber should not be measured or governed by the customary commission of five per cent., but should be fixed by the measure of *quantum meruit*, and ten per cent. is not an unreasonable compensation for his services. *Harman v. Moss*, 399.

In effecting a sale of timber on land which he held in common with appellees and others, appellant also granted to the purchaser of the timber, as part of the consideration for the purchase price, a right of way over a tract of which he was sole owner. Held: That the proper measure of compensation for the right of way was the price therefor at which the appellant, under the circumstances, could reasonably have expected to sell it, in connection with the sale of his interest and the other interests which he was authorized to sell in the timber, and in connection also with the sale of the timber on his own tract, and not its salable or condemnation value, independent of its acquisition by the vendee in connection with the purchase of the timber. Nor would a valuation of the right of way on the basis of the price at which the timber in which appellees were interested would have sold, independently and separately from the sale of the timber on appellant's own tract and the right of way across it, be a correct measure of its value. *Harman v. Moss*, 399.

Boundaries.—See BOUNDARIES.

Construction of Contract.—See *infra*, "Parol Evidence."

In a written contract for the sale of land the vendor agreed to convey to the vendee by deed with general warranty of title, a tract of land supposed to consist of 103 acres, more or less, and all the buildings and improvements thereon, which was conveyed to said vendor by his father by a certain deed, which land had for a number of years been occupied by the vendor as a home. A deed conveying 107½ acres of the land conveyed to vendor by his father by the deed referred to, which had long been occupied by the vendor as a home place, complies with this contract, although this 107½ acres was not all of the tract conveyed to the vendor by his father in the deed referred to, the vendor having twelve years previously conveyed three acres to another party, who had at once built upon and improved the premises. There was evidence that the vendee knew of this sale and

VENDOR AND PURCHASER—Continued.**Construction of Contract—Continued.**

from her conduct it appeared that she knew that the three acres in question were not included in her contract with the vendor. *Riner v. Lester*, 563.

Easements.—Where an easement of a telephone company to maintain its telephone line erected along the margin of the land, which was the subject of an executory contract of sale, was visible upon the land at the time the contract was made, the purchaser is presumed to have taken into consideration the existence of this encumbrance in fixing upon the amount of the purchase money. And where such easement was not an injury, but a benefit to the market value of the land, it cannot be considered to be an encumbrance of which the vendee could complain. *Sachs v. Owings*, 162.

Encumbrances.—Mere knowledge of any encumbrance at the time of the contract, and the mere taking possession with such knowledge, especially where the contract provides for possession in advance of the conveyance, does not necessarily cut off a defense against the specific execution of a contract for the sale of real estate; but where the circumstances and the conduct of the parties show that the existence of an open, visible, physical encumbrance of the property must have been taken into consideration in fixing the price of the property, the purchaser can neither refuse to complete the purchase nor require an abatement of the price. This rule finds its most frequent expression in cases involving public highways, but this is due mainly to the fact that public highways are always open and visible, and the reason of the rule applies to any visible and obvious physical servitude. In such cases a covenant of general warranty is not broken by the continued adverse use of the road or right of way. *Riner v. Lester*, 563.

Equity.—See *infra*, "Relief in Equity against Collection of Purchase Money."

Insanity.—See *INSANITY*.

Liens.—A vendee is entitled to receive a title free of judgment and tax liens, but a vendee cannot elect to rescind and treat a contract as rescinded on the ground that the title is not a marketable title because there are encumbrances on the land purchased, if they are of such character and amount that he can apply the unpaid purchase money to the removal of the encumbrances. This can be done where the amount of the encumbrance is definite, does not exceed the unpaid purchase money due, is presently payable (as was

VENDOR AND PURCHASER—Continued.

Liens—Continued.

the case with a delinquent tax lien in the instant case), and its existence is not a matter of doubt, or dispute, or the situation is not such with respect thereto as to expose the vendee to litigation on the subject. *Sachs v. Owings*, 162.

Judgment liens barred by the statute of limitations do not, even at law, render a title unmarketable, and though not barred by the statute where they are for definite amounts, and less than the purchase money due and unpaid would discharge, and are presently payable, they do not render the title unmarketable. *Sachs v. Owings*, 162.

Marketable Title.—See *infra*, "Title."

Options.—See OPTIONS.

Parol Evidence.—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury, or by the court, by the aid of extrinsic evidence. *Asberry v. Mitchell*, 276.

Where, in construing a contract of sale, the knowledge of the vendee of the prior conveyance of three acres of the land in question to another by the vendor, was a material fact for the court to know in determining the probable intention of the parties, the testimony of the husband of the vendee that the vendor had told him that after taking off the three acres from the tract 108 acres would remain, was not objectionable as in violation of the rule against the use of parol evidence to vary the terms of a written contract. *Riner v. Lester*, 563.

Purchaser for Value and without Notice.—See LIS PENDENS; RECORDING ACTS.

Docketing Judgments.—The docketing of a judgment is required to give notice to subsequent purchasers, but the docketing of a judgment against the judgment debtor gives no notice of the lien of the judgment upon land, the legal title to which stands in the name of another. *Vicars v. Weisiger Clothing Co.*, 679.

Judgment Creditors.—If a judgment debtor purchases land and procures it to be conveyed to another, and that other conveys it in trust to secure a *bona fide* debt, that creditor being ignorant that the judgment debtor had furnished the purchase money, the judgment creditor has no lien upon the land for his debt as against the creditor secured by the deed of trust. *Vicars v. Weisiger Clothing Co.*, 679.

VENDOR AND PURCHASER—Continued.**Purchaser for Value and without Notice—Continued.**

Latent Equities.—A purchaser for value without notice, actual or constructive, will not be affected by a latent equity whether by lien, encumbrance, or trust, or fraud, or any other claim, and a grantee from such purchaser stands in the same position as his grantor, although such grantee was affected with notice at the time of the grant. *Vicars v. Weisiger Clothing Co.*, 679.

Real Estate Brokers.—See **BROKERS**.

Recording Acts.—See **RECORDING ACTS**.

Relief in Equity against Collection of Purchase Money.—In Virginia, the rule is that to entitle a purchaser of real estate to relief in equity against the collection of the purchase money on the ground of a defective title where the sale has been consummated by the execution and acceptance of a general warranty deed (without other covenants), the title must be questioned by a suit either prosecuted or threatened, or it must be clearly shown that the title is defective. Uncertainty about the existence of a will of a prior owner of the land through whom the vendor claims, and about its provisions if it does exist, does not constitute such clear defect in the title as to afford the vendee any ground for relief against the payment of the purchase money. *Roberts v. Hagan*, 573.

Rescission.—A mutual agreement to rescind an executory contract under seal for the sale of land, if executed by actual cancellation or destruction of the contract, operates to annul it. But a parol executory agreement to cancel the contract could not operate, at law, to release the obligations of the contract under seal. *Sachs v. Owings*, 162.

Where, in accordance with an executory contract of sale, there has been a valid delivery and acceptance of a deed, and an execution and delivery of the purchase money bonds, the vendee is concluded from asserting that an exception in the deed of three acres included in the metes and bounds, previously conveyed by the vendor to another, was a material departure from the terms of the executory contract entitling her to a rescission. *Riner v. Lester*, 563.

If either party wishes time after the day fixed, for completing the contract, he must resort to a court of equity where, in proper cases, the rigid rule of the common law on this subject will be relaxed. The vendee under a contract for a good and sufficient deed, with general warranty and covenants of title may, at law, elect to rescind the contract,

VENDOR AND PURCHASER—Continued.

Rescission—Continued.

if his vendor cannot, on the day fixed for completing it, convey to him a marketable title, and in such case, as he is not in equity asking the enforcement of the contract and his vendor is in default already, the vendee is not required to tender payment to his vendor of any balance due of unpaid purchase money, or to do any further act himself in completion of the contract, such as tendering notes for deferred payments contracted for, or the like, which would in such case be superfluous. *Sachs v. Owings*, 162.

Seal.—At law, the common-law rule that an executory contract under seal can be modified or abrogated only by an instrument of equal dignity, *i. e.*, by one under seal, has not been relaxed. It is only in equity, where the distinctive equitable principles applicable in that forum may be invoked, that there has been a relaxation of such rule. *Sachs v. Owings*, 162.

Specific Performance.—See SPECIFIC PERFORMANCE.

Sufficiency of Description of Land.—In a contract for the conveyance of land, the specific performance of which was sought by complainant, the land was described as 100 acres of land bounded by R. on the north and by M. on the south, off of the west end of the farm of the vendor. The location of the R. and M. tracts, and the western boundary of the vendor's land were well known to all the parties. As the language of the contract, giving the north and south boundary, and providing that the 100 acres be cut off of the west end of the farm of the vendor, necessarily imports that the east line must run due north and south, the land is sufficiently described in the contract to enable the court, with the aid of permissible extrinsic evidence, to locate it. *Asberry v. Mitchell*, 276.

Time as Essence of a Contract of Sale. *Sachs v. Owings*, 162.

Title.—See *infra*, "Relief in Equity against Collection of Purchase Money;" "Rescission by Vendee."

A vendee is entitled to receive a title free of judgment and tax liens, but a vendee cannot elect to rescind and treat a contract as rescinded on the ground that the title is not a marketable title because there are encumbrances on the land purchased, if they are of such character and amount that he can apply the unpaid purchase money to the removal of the encumbrances. This can be done where the amount of the encumbrance is definite, does not exceed the unpaid pur-

VENDOR AND PURCHASER—Continued.

Title—Continued.

chase money due, is presently payable (as was the case with a delinquent tax lien in the instant case), and its existence is not a matter of doubt or dispute, or the situation is not such with respect thereto as to expose the vendee to litigation on the subject. *Sachs v. Owings*, 162.

A vendee, under a contratt for a good and sufficient deed, with general warranty and covenants of title, is entitled to require from his vendor a conveyance of a marketable title on the day fixed by the contract for completing the contract, where the action is at law, as in the instant case; time always being considered of the essence of the contract where it is construed at law. *Sachs v. Owings*, 162.

A vendee who is entitled only to a marketable title, can only demand such title as a reasonably well-informed and intelligent purchaser, acting upon business principles, would be willing to accept. *Sachs v. Owings*, 162.

Judgment liens barred by the statute of limitations do not, even at law, render a title unmarketable, and though not barred by the statute where they are for definite amounts, and less than the purchase money due and unpaid would discharge, and are presently payable, they do not render the title unmarketable. *Sachs v. Owings*, 162.

Where an easement of a telephone company to maintain its telephone line erected along the margin of the land, which was the subject of an executory contract of sale, was visible upon the land at the time the contract was made, the purchaser is presumed to have taken into consideration the existence of this encumbrance in fixing upon the amount of the purchase money. And where such easement was not an injury, but a benefit to the market value of the land, it cannot be considered to be an encumbrance of which the vendee could complain. *Sachs v. Owings*, 162.

Where the vendor of real property, under an executory contract of sale, agreed to deliver to the vendee a good and sufficient deed for the property in question, with general warranty and covenants of title, the purchaser is entitled to require a marketable title to be conveyed to him by his vendor, but not a record title, nor one which an abstract of title would show to be good, or free of liens or encumbrances, nor one in fact free of liens or encumbrances. *Sachs v. Owings*, 162.

Title Bond.—Where an answer sets up a title bond as a source of title and files the bond as a part of the answer, the execution and delivery of the title bond not being denied, no

VENDOR AND PURCHASER—Continued.**Title Bond—Continued.**

other evidence of its execution is necessary under section 3279, Code of 1904. *Robinett v. Taylor*, 583.

Trees and Timber.—See TREES AND TIMBER.**Variance between Executory Contract and Deed.—See *infra*, "Rescission."**

Vendor's Lien.—No lien or encumbrance created or suffered by the vendee can prejudice a prior lien for the purchase money. *Roberts v. Hagan*, 573.

Witnesses.—Transactions with Decedent.—A vendee of an interest in a decedent's estate is an incompetent witness to prove the purchase after the death of the vendor. But the vendee should be given the opportunity of showing what, if any, payments were made by him on the purchase, and be credited by such payments as might be established. *Robinett v. Taylor*, 583.

VENDOR'S LIEN. See **VENDOR AND PURCHASER.**

VERIFICATION. See **DOCUMENTARY EVIDENCE; SERVICE OF PROCESS.**

Affidavit of Defense.—See **ASSUMPSIT.**

VICE PRINCIPAL. See **FELLOW SERVANTS.**

VOLUNTARY CONVEYANCES. See **FRAUDULENT AND VOLUNTARY CONVEYANCES.**

VOLUNTARY PAYMENT. See **PAYMENT; TAXATION.**

WAIVER.

Cause and Nature of Accusation.—While the Constitution guarantees to every man the right to demand "the cause and nature of his accusation," it does not prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment or information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand "the cause and nature of his accusation." If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and

WAIVER—Continued.**Cause and Nature of Accusation—Continued.**

which he will be held to have waived unless he asserts it.
Pine v. Commonwealth, 812.

Summons and Process.—The doctrine of waiver has no application to a void process. *Johnston v. Pearson*, 453.

WARRANTY OF TITLE. See COVENANTS.**WASTE.**

Options.—The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder, and the proceeds divided among his heirs. Defendant had acquired the option of the two sons to purchase, but as he had also acquired the interests of all the heirs in the estate, although unable to prove the purchase of the share of a deceased heir, he thought there was no necessity for his making an election to purchase under the option. Held: As the defendant had the right to purchase the land at \$1,800, and in good faith believed he had purchased the share of the deceased heir, the heirs of such deceased heir having not asserted their claim before the institution of the suit, a forfeiture would not be enforced in their favor, but they should be restricted to their share of the \$1,800. The defendant having clearly elected to keep the land at \$1,800, no account should be taken of waste to or timber removed from the land by him. *Robinett v. Taylor*, 583.

WATERS AND WATERCOURSES.

Boundaries.—See **BOUNDARIES**.

Flooding Lands.—See *infra*, "Limitation of Actions."

Limitation of Actions.—The milling act of February, 1745 (5 Hen. Stat. 360), the act in force when the dam in the instant case was built, provided no forfeiture penalty in case the mill was rendered unfit for use and not rebuilt within a certain time. There is, therefore, nothing in that act to take the case out of the operation of the statute of limitations, as stated in the first syllabus. *Norfolk & W. R. Co. v. Hayden*, 118.

The preponderance of evidence in the instant case fails to show that the dam in question was established under any of

WATERS AND WATERCOURSES—Continued.

Limitation of Actions—Continued.

the milling acts. Hence, the plaintiff has failed to establish his right to rely upon such acts, or any of them, to take the case out of the operation of the statute of limitations. *Norfolk & W. R. Co. v. Hayden*, 118.

Where the injury complained of arose from the flooding of complainant's lands by reason of defendant's dam—a permanent structure—the cause of action for such injury arose at the time of the first commencement of the injury following the original erection of the dam and the right of action for all such injury, past, present and future was barred by the statute of limitations after the expiration of five years thereafter, unless there is something to take the case out of the general rule on the subject. *Norfolk & W. R. Co. v. Hayden*, 118.

Milling Acts.—See MILLS AND MILLDAMS.

WILLFUL TRESPASS. See TREES AND TIMBER.

WILLS. See EXECUTORS AND ADMINISTRATORS.

"Bequests."—Although the word "bequests," if given its technical meaning would include a residuary gift, yet where from other portions of the will it clearly appears that the testatrix used the word in the sense of specific bequests, it should be given that meaning. *Hanckel v. Holcombe*, 392.

Codicils.—Every part of a will, including eodicils, must be construed together in cases of doubt, in order to ascertain the meaning of the testator. *Hanckel v. Holcombe*, 392.

Construction.—See *infra*, "Bequests;" "Jus Disponendi;" "Personal Estate;" "Presumption against Intestacy;" "Technical Words."

A will is to be construed as of the date of the death of the testator and its provisions cannot be changed to meet a contingency not foreseen by the testator. Thus, where a testator made ample provision in his will to insure his widow a "comfortable support" at the time of his death, these provisions cannot be changed to meet a contingency not foreseen by the testator, viz., the increased cost of living since his death. *Hurt v. Hurt*, 413.

Every part of a will, including codicils, must be construed together in cases of doubt, in order to ascertain the meaning of the testator. *Hanckel v. Holcombe*, 392.

If the testator himself has clearly explained or indicated

WILLS—Continued.**Construction—Continued.**

the meaning which he attaches to a particular word, that meaning must prevail in order to carry out the testator's intent, irrespective of the technical or grammatical meaning of such word. *Hanckel v. Holcombe*, 392.

In the construction of wills the intention of the testator, if not inconsistent with some established rule of law, must control; yet that intention must be found in the language of the testator used in the will; in the meaning of the words used by the testator, when properly interpreted, rather than his presumed or supposed intention. *Hurt v. Hurt*, 413.

The testator directed that the place on which he lived should be rented and the proceeds applied to the support of his wife and two unmarried daughters, and after the death of his wife directed that the land be sold to two of his sons for \$1,800, but if they failed to pay for it in a certain time, the land to be sold to the highest bidder, and the proceeds divided among his heirs. Defendant had acquired the option of the two sons to purchase, but as he had also acquired the interests of all the heirs in the estate, although unable to prove the purchase of the share of a deceased heir, he thought there was no necessity for his making an election to purchase under the option. Held: As the defendant had the right to purchase the land at \$1,800, and in good faith believed he had purchased the share of the deceased heir, the heirs of such deceased heir having not asserted their claim before the institution of the suit, a forfeiture would not be enforced in their favor, but they should be restricted to their share of the \$1,800. The defendant having clearly elected to keep the land at \$1,800, no account should be taken of waste to or timber removed from the land by him. *Robinett v. Taylor*, 583.

Contract for Gift to Be Perfected by Will.—See FRAUDS, STATUTE OF.

Insanity.—See *infra*, "Testamentary Capacity."

Jus Disponendi.—A testator devised to his executors all his property, both real and personal, in trust during the life of his wife; and provided that the executors should take charge of his "personal estate" and convert the same into money, except so much as his "wife might desire to keep for her use," and further directed that from the rental of his real estate and the interest from his personal estate, the executors should pay to his wife, as she needed it, so much as would give her a "comfortable support," "my wife to be judge of the amount

WILLS—Continued.

Jus Disponendi—Continued.

she may need." Held: That the widow was not given the *jus disponendi* of the intangible personal estate under these provisions of the will. *Hurt v. Hurt*, 413.

The word "use" does not in its ordinary meaning import any power of disposition of the *corpus* referred to—the *jus disponendi* of the *corpus*—but the contrary; indeed, only the right to use and enjoy the benefit of the *corpus* is implied by the word "use." *Hurt v. Hurt*, 413.

Personal Estate.—The words "personal estate," in a will, are broad enough to cover intangible personal property as well as tangible property. *Hurt v. Hurt*, 413.

Presumption against Intestacy.—There is a presumption against partial intestacy. A testator directed that the "Creek Farm," which he described as "the place I now live on," should be rented and the proceeds applied to the support of his wife and two unmarried daughters. After his death he directed that the land be sold to two of his sons, naming them, at the price of \$1,800, but in the event of their not being able to pay for it within a certain time, he directed that the land be sold to the highest bidder, "and the personal * * * that she may have at her death and after our *feunendl* expenses and all other just debts be paid I desire that all the debts that is coming to me now due be collected and the property that may be sold, and all just claims paid that the remainder be equally *divided* among all the heirs" except his daughter M. and his three sons. M. to have two hundred dollars paid to her in a way that her husband could not waste, and the other girls to have "two hundred dollars each in the divide more that the boys all considered." Held: That the testator intended that his tangible personal property, choses in action and the proceeds of the "property that may be sold" should constitute a fund from which the funeral expenses of himself and wife, and his debts, were to be deducted, and the balance constituted "the remainder" which was to "be equally divided," and, that the testator did not die intestate as to the "Creek Farm" upon which he resided, but that it was included in the words "the property that may be sold" and constituted part of the fund to be equally divided among the heirs, and that the daughter M. took no share in the division of this remainder. *Robinett v. Taylor*, 583.

Technical Words.—When a testator uses technical words, he is presumed to know their technical meaning, and this technical

WILLS—Continued.**Technical Words—Continued.**

meaning will be ascribed to them. *Hanckel v. Holcombe*, 392.

When technical words are used they are presumed to be used technically and words of a definite legal signification are to be understood as used in their definite legal sense unless the contrary appears on the face of the instrument. *Hurt v. Hurt*, 413.

Testamentary Capacity.—A father in his last days totally disinherited his son by a deed and a will because of certain rumors relating mainly to his son's attitude and conduct towards him, which had some foundation in fact, but which the son could apparently have satisfactorily explained if his father had been willing to give him a fair hearing and listen to a reasonable explanation. It did not appear from the evidence that the father's disposition of his property could be attributed to mental incompetency, for the evidence conclusively shows that he was entirely capable of transacting business when he made the change in his will and when he executed the deed; nor to undue influence from others, for he is shown to have been a man of strong purpose, and there is no evidence, except possibly by way of inference, that any person or persons attempted to influence or control him in the matter; nor was it due to what the law recognizes as an insane delusion, for although the rumors of what his son had said and done were evidently exaggerated in his own imagination, as a result of his high temper and suspicious disposition, and probably as a result of inaccurate information, these rumors were nevertheless founded upon actual occurrences. Held: That the lower court did not err in holding that the father at the time of the execution of the deed and will attacked, was possessed of the requisite mental capacity to make the same, and that these papers were not rendered invalid by any undue influence brought to bear upon him. *Wohlford v. Wohlford*, 699.

As a general rule the right of a testator to dispose of his estate as he likes depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and, as to his relatives, all that is required of him at the time of making his will is that he shall possess ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them to consideration. In determining whether certain relatives are such objects, he must possess ability to reach a rational conclusion, however erroneous or unjust,

WILLS—Continued.

Testamentary Capacity—Continued.

with reference to them. Hence, ordinarily, capricious and arbitrary likes and dislikes of his relatives who are the objects of his bounty, or should be, are not evidence of insanity or a want of mental capacity to make a will, on the part of a testator who entertains such likes or dislikes. *Wohlford v. Wohlford*, 699.

Undue Influence.—Facts held not to constitute undue influence. *Wohlford v. Wohlford*, 699.

"Use."—*Hurt v. Hurt*, 413.

WITNESSES.

Appeal and Error.—The refusal of a trial court to permit a witness to answer a question will not be considered on appeal when the expected answer is not given, as the court cannot determine its materiality. *Triplett v. Second National Bank*, 189.

Character.—*Community—Neighborhood*.—Fellow workmen of a brakeman and flagman on a railroad and other persons with whom he came in daily contact at the termini of the road and along the line of his route, are of his community and neighborhood within the rule that confines testimony as to the general reputation of a witness for truth and veracity to members of the community or neighborhood in which the witness lives. *Brotherhood of R. T. v. Vickers*, 311.

Neighborhood.—A man's neighborhood or place of residence extends for the purpose of impeaching him as a witness as far as he is well known, as far as people are acquainted with him and his character. The impeaching witness must "know his reputation among his general associates." *Brotherhood of R. T. v. Vickers*, 311.

Witness Also a Party.—In a criminal prosecution or some other controversy involving the moral character of a party, the evidence must be limited to his general reputation *ante litem motam*; and in such case when a witness is also a party, it would seem that the rule applicable to parties should apply. But when a party is also a witness and his character is not in issue upon the pleadings, and the question of his general reputation for truth and veracity arises in the usual way, dissociated from any charge of turpitude, he stands as any other witness, and evidence of his reputation, even up to the time of testifying, is generally regarded as admissible. *Brotherhood of R. T. v. Vickers*, 311.

WITNESSES—Continued.**Character—Continued.**

The fact that witnesses who testify as to the reputation of a witness who is also a party, were parties to the litigation, affects the credibility, but not the competency of the character witnesses. *Brotherhood of R. T. v. Vickers*, 311.

Community.—*Brotherhood of R. T. v. Vickers*, 311.

Confidential Communications.—See *infra*, "Privileged Communications."

Continuance.—See CONTINUANCE.

Cross-Examination.—Libel and Slander.—If defendants, in an action for libel, are not content to let the case stand upon the general damages presumed by law, but wish to rebut this presumption by questioning plaintiff on cross-examination as to what actual injury plaintiff had in fact sustained by the libel, they have the right to do so, in diminution of damages. But having asked the question, they cannot object to an answer in direct response to the question. *Henry Myers & Co. v. Lewis*, 50.

Divorce.—In a suit for divorce on the grounds of cruelty and adultery, the reading of the deposition of the complainant was assigned as error. It was conceded that the witness would have been competent if the suit had been based solely on the charge of cruelty, but it was contended that as he was not competent to testify upon the charge of adultery, he was incompetent for all purposes. The deposition, with the exception of a statement by witness that he had not condoned his wife's infidelity, dealt entirely with the charge of cruelty, and the decree complained of was based solely on the charge of adultery. Held: That as the statement, which tended to negative condonation, might be disregarded without affecting the correctness of the decree, the question of the competency of the witness was immaterial. *White v. White*, 244.

Due Diligence.—See NEW TRIALS.

Examination of Witnesses.—See *infra*, "Redirect Examination."

Neighborhood.—See *infra*, "Character." *Brotherhood of R. T. v. Vickers*, 311.

Privileged Communications.—A person's own statement of his own taxable property, to the proper official, is not a privileged communication at common law. The State may make such communications privileged by express statute; otherwise, they are not privileged. *Peden v. Peden's Adm'r*, 147.

WITNESSES—Continued.**Privileged Communications—Continued.**

Oral statements, not under oath, by defendant to the examiner of records of his circuit and the commissioner of revenue of his city, that the notes in question were not his property on the first of February preceding his mother's death, and did not come into his possession or become his property until after the death of his mother, were not privileged communications at common law, nor were they made so by the act of 1915, p. 158, providing that the answers required under oath under that act should not be disclosed unless called for by a court of record, or by the State advisory board, or a local board of review. Under the present statute, Acts 1916, p. 420, such statements would be privileged. *Peden v. Peden's Adm'r*, 147.

Redirect Examination.—Counsel for defendant, in cross-examining the plaintiff, brought out the fact that plaintiff had been discharged from the employment of defendant on the ground that he had been stealing tickets from defendant. On redirect examination plaintiff was allowed to state that he had not been guilty. The issue involved was irrelevant, but it was injected into the case by the defendant, and there was nothing in connection with the manner in which it was subsequently dealt with upon which the defendant can base any just ground of exception. *The Ferries Co. v. Brown*, 13.

Taxation.—See *infra*, "Privileged Communications."

Transaction with Decedent.—A vendee of an interest in a decedent's estate is an incompetent witness to prove the purchase after the death of the vendor. But the vendee should be given the opportunity of showing what, if any, payments were made by him on the purchase, and be credited by such payments as might be established. *Robinett v. Taylor*, 583.

WORDS AND PHRASES.

"Bequests."—*Hanckel v. Holcombe*, 392.

Building.—*McCorkle & Son v. Kincaid*, 546.

Community.—*Brotherhood of R. T. v. Vickers*, 311.

"County Road or Highway."—*Washington-Va. Ry. Co. v. Fisher*, 229.

"Domicil."—*Cooper's Adm'r v. Commonwealth*, 338.

"In Full."—*Norfolk Hosiery Co. v. Westheimer*, 130.

"May."—*Board of Supervisors v. Cahoon*, 768; *Johnston v. Pearson*, 453.

Words and Phrases—Continued.

Merchantable Timber.—McCorkle & Son *v.* Kincaid, 546.

Neighborhood.—Brotherhood of R. T. *v.* Vickers, 311.

"Ordinary Care."—Seaboard A. L. Ry. *v.* Abernathy, 173.

"Personal Estate."—Hurt *v.* Hurt, 413..

"Property."—Robinett *v.* Taylor, 583.

"Residence."—Cooper's Adm'r *v.* Commonwealth, 338.

"Shall."—Board of Supervisors *v.* Cahoon, 768; Johnston *v.* Pearson, 453.

"Use."—Hurt *v.* Hurt, 413.

"Willful."—Wood and Others *v.* Weaver, 250.

WORKING CONTRACTS.

Assignment by General Contractor.—See ASSIGNMENTS.

WRITING. See FRAUDS, STATUTE OF.

YEAR TO YEAR. See LANDLORD AND TENANT.

